INDEX.

PAGE

STATEMENT OF CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT OF POINTS—

I. Habeas corpus cannot take place of writ of error 11

(A) Proceeding not technical 11

(B) Commission's decision conclusive 11

II. Treaty created an unqualified obligation to extradite. Resort to state law is to ascertain definition of treaty crime in which case crimes need not have same name 15

(A) Federal statute does not require local criminality 23

(B) 1889 treaty does not require local criminality 25

(C) Crime in two countries need not have same name 27

III. Complaint meets statutory and treaty requirements 41

IV. Receiving money knowing it to have been fraudulently obtained is criminal by State and Federal Statutes 45

(A) Received property transferred to defraud those from whom it was obtained by fraudulent means is guilty in Illinois 45

PAGE

(B) Receiver of stolen or embezzled property is guilty in Illinois 51

(1) Forms of larceny and embezzlement 52

(C) Federal Statute on receiving property feloniously obtained 56

V. Kelly v. Griffin, 241 U. S. 6 holds receiving money known to have been fraudulently obtained is criminal by laws of Illinois..60-74

VI. Dawes-Simon Treaty not in force 74

(A) If in force it would not abrogate this proceeding 81

(B) It embraces the present charge 83

CONCLUSION 85

TABLE OF CASES CITED.

A

Adutt, In re, 55 F. 376 43
Anderson, In re, 11 Upper Can. Com. Pleas Ref. 2.....37, 41
Armstrong v. Bidwell, 124 Fed. 690, 692, 694 81
Arnton, In re, 1 Q. B. 509 (1896) 37

B

Benson v. McMahon, 127 U. S. 457, 462, 466 38
Bingham v. Bradley, 241 U. S. 511 23

C

Charlton v. Kelly, 229 U. S. 447 .....18, 26
Collins v. Loisel, 259 U. S. 309, 311 .....23, 29, 30, 51

PAGE

D

Doe v. Braden, 51 U. S. (16 How.) 635 80
Dove, Exp. 49 Fed. (2d) 816 81
DuBrocka y Paniagua, 33 Fed. (2d) 181 23

E

Elias v. Ramirez, 215 U. S. 398 ..... 11, 23

F

Factor v. Laubenheimer, 61 Fed. (2d) 626 (C. C. A.) 16, 57
Fernandez v. Phillips, 268 U. S. 311 11
Frank, In re, 107 Fed. 272 38

G

Geen, alias Greene, In re (Judge Dickinson's opinion —Appendix to respondents' brief in opposition to petition for certiorari) 16
Great Nor. Ry. Co. v. U. S., 155 Fed. 945 81
In re Greene, 7 Can. C. C. 389 32
9 Can. C. C. 254 32
10 Can. C. C. 154 32
Grin v. Shine, 187 U. S. 181, 184 ..... 12, 24, 31, 32, 43

H

Heilbronn, Alex., Ex p. 12 N. Y. Leg. Obs. 65 14
Heinrich, In re, 11 Fed. Cas. No. 6323 14
Herres, In re, 33 Fed. 167 12

PAGE

K

Kelly v. Griffin, 241 U. S. 615 ..... 31, 47, 60
Kenton v. Pontalba, 40 La. Rep. 342 81
King v. Dix, 18 Times Law Rep. 231 37
Klein (U. S. ex rel. Klein v. Mulligan) 50 F. (2d) 687.. 32
Krojanker, In re, 44 Fed. 482 14

M

McNamara v. Henkel, 226 U. S. 520 14
Merlo v. Coal Mining Co., 258 Ill. 328 81
Metzger, In re, 17 Fed. Cas. 9511 ..... 20, 75

N

Neely, In re, 103 Fed. 626 87
New Orleans Co. v. Louisiana Co., 125 U. S. 18..... 82

O

Ornelas v. Ruiz, 161 U. S. 502, 507 ..... 11, 12, 14, 43
Oteiza y Cortes, 126 U. S. 330, 334 14

P

Pettit v. Walshe, 194 U. S. 205 ..... 11, 31, 44
Powell v. U. S., 206 Fed. 400 32

Q

Queen v. Govr. Prison at Halloway, 16 Times L. R. 247 37

PAGE

R

Reg. v. Ganz, 46 Times L. Rep. 247 37

Rice v. Ames, 180 U. S. 371, 378, 379 43

Roth, In re, 15 Fed. 506 42

S

Shepard v. N. W. Life Ins. Co., 40 Fed. 341, 347 81

Stevens v. Griffith, 111 U. S. 48 82

Statutes:

Sec. 29, Title 1, U. S. C. A. 82
Sec. 339, Title 18, U. S. C. A. 58
Sec. 467, Title 18, U. S. C. A. 56
Sec. 468, Title 18, U. S. C. A. 59
Sec. 651, Title 18, U. S. C. A. (Extradition) 23, 41
Chap. 32, Sec. 287, Ill. Rev. Stat. 1931 55
Chap. 38, Sec. 228, Ill. Rev. Stat. 1931 ..... 52, 84
Chap. 38, Sec. 230, Ill. Rev. Stat. 1931 59
Chap. 38, Sec. 239, Ill. Rev. Stat. 1931 51
Chap. 38, Sec. 294, Ill. Rev. Stat. 1931 45
Chap. 38, Sec. 380, Ill. Rev. Stat. 1931 52
Chap. 38, Sec. 388, Ill. Rev. Stat. 1931 53
Chap. 38, Sec. 390, Ill. Rev. Stat. 1931 55

English Statutes:

8 Butterworth's Comp. St. 1929 ..... 76, 77

T

Terlinden v. Ames, 184 U. S. 270 ..... 13, 14, 43, 82

Thomas, Ex p. 38 Dom. Law. Rep. 716 37

PAGE

Treaties:

Extradition treaty with England 1842 (Vol. 1, Malloy's Treaties, p. 655) 19, 20, 26, 41

Extradition treaty with England 1889 (Vol. 1, Malloy's Treaties, p. 740) 25, 26, 27, 41

Extradition treaty with Uruguay (Vol. 2, Malloy's Treaties, p. 1825) 23

U

U. S. v. Greene and Gaynor, 146 Fed. 766 33

U. S. v. Greene and Gaynor, 154 Fed. 401, ... 33, 34, 35, 36, 43, 44

U. S. v. Rauscher, 119 U. S. 407 38

W

Waldradt v. Brown, 6 Ill. 397 46

Welander v. Hoyt, 176 N. W. 594 (Ia.) 81

Williams v. Bruffy, 96 U. S. 176 82

Windsor, In re, 6 Best & Smith's Rep. 522 38

Wright v. Henkel, 190 U. S. 40, 58, 61 ..... 27, 28, 29, 47, 57

Y

Yordi v. Nolte, 215 U. S. 181, 184 ..... 12, 42

Z

Zentner, Ex p. 188 Fed. 344 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 693

JOHN FACTOR,

Petitioner,

vs.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,

Respondents.

BRIEF OF RESPONDENTS ON CERTIORARI.

STATEMENT OF THE CASE.

This extradition proceeding was commenced upon the complaint (Trans. Vol. 1, p. 12) of the British Consul General, dated May 25, 1931, in which it is charged that H. Wise, alias J. Factor, alias Guest, alias J. Walker, received an aggregate of £458,500 from the Broad Street Press knowing it to have been fraudulently obtained.

The crime charged is embraced in the supplemental extradition treaty of 1889 (Malloy's Treaties, Vol. 1, p. 740),

enumerating this crime with others in the following language:

> "3. Embezzlement; larceny; *receiving any money*, valuable security, or other property, *knowing the same to have been* embezzled, stolen or *fraudulently obtained.*"

The demanding government submitted its evidence duly authenticated as required by the Federal Statutes, (Sec. 655, Title 18, U. S. C. A.) and the same was admitted by the Commissioner. The accused was held for extradition by Commissioner Walker on January 12, 1932 (Trans. Vol. 1, p. 8) and the opinion of the Commissioner appears on page 16, Volume 1 of the transcript.

In July, 1931, while the matter was still pending before Commissioner Walker, a petition for writ of habeas corpus was filed alleging, as now, that the crime of receiving money knowing it to have been fraudulently obtained is not criminal under the laws of Illinois and therefore not extraditable. Judge FitzHenry struck this petition. His opinion appears on page 44 of Respondents' Brief opposing the petition for writ of certiorari. Factor's appeal taken from this decision was later withdrawn.

After the accused was held for extradition by Commissioner Walker a new application was heard by Judge Carpenter, who discharged the accused, thus reversing Commissioner Walker and his colleague, Judge FitzHenry. His opinion appears in Vol. 1, Trans. 51 to 58 (Trans. Vol. 1, pp. 51 to 58).

The Circuit Court of Appeals reversed Judge Carpenter and sustained Commissioner Walker (61 Fed. 2d 626) also (Trans. Vol. 2, pp. 1166 to 1179).

One of Factor's co-conspirators, Arthur Klein, also charged with the crime of receiving, has been extradited,

tried and convicted. (Opinion of Judge Knox appears in appendix to Respondents' Brief to the petition for certiorari; affirmed, 50 Fed. 2d 687; certiorari denied, 284 U. S. 665.) Another co-conspirator, Harry Geen, alias Green, was held for extradition by Judge Dickinson, who also denied an application for writ of certiorari. (Opinion appears in appendix to Respondents' Brief in opposition to the petition for certiorari.) Geen appealed, but withdrew this appeal following Factor's defeat in the Circuit Court of Appeals. On Geen's return to England he was convicted.

Questions Involved.

As we view the matter it is only by an examination of the facts that we are able to interpret the treaty charge in the complaint. It is our contention that these facts disclose that the Broad Street Press was itself a fraudulent enterprise; that it committed various frauds upon its customers by holding itself out as a broker when in fact it sold as principal the shares of the fraudulent companies created to complete the fraud, which were the Vulcan Copper Mines, Asbestos & Holding Trust Company and the Rhodesia Border Mining Corporation. Fraudulent representations were made with respect to these companies, and in order to effect a sale of the stock a pretended profit was given to the customer so that he would direct that his funds held by the Broad Street Press be invested in one of these three companies. We have filed an appendix to this brief in which appears a synopsis of the facts as they were outlined in the brief which we filed in the Circuit Court of Appeals.

The opinions of the various Judges who have passed upon these three extradition cases further elucidate the facts and ably set out the scheme employed. It is our con-

tention that, among other things, the evidence discloses on the part of the Broad Street Press and its agents crimes of larceny, embezzlement and false pretense. Insofar as the money which Factor received was obtained by various forms of larceny and embezzlement under the Illinois statutes, there can be no question of his guilt under the Illinois Receiving Statute. Various Federal statutes are also applicable.

It is contended by petitioner that the British consul's complaint is insufficient for the reason that it fails to allege a crime cognizable under the laws of Illinois. We contend that the complaint is sufficient. We take the position that assuming it to be necessary that the evidence show an act criminal under the laws of this country or under the laws of the State of Illinois, there are applicable statutes. We further contend that this is not an essential requirement so long as it is not disputed that the crime charged is the treaty crime. There is no dispute of that fact in this case. Furthermore, in the Klein and Geen cases, the executive and judicial branches of our government has recognized the crime charged as the treaty crime.

Petitioner alleges that the Dawes-Simon Treaty (Trans. Vol. II, p. 1252) has abrogated these proceedings. It is our contention that the Dawes-Simon Treaty is not in force by virtue of its own terms, in view of the fact that under the laws of England an order in council is a condition precedent to its going into force and that such an order in council has not been entered. We furthermore contend that assuming that the Dawes-Simon Treaty is in force it does not invalidate the present proceeding. This was the ruling of the Circuit Court of Appeals (Trans. Vol. II, p. 1288).

SUMMARY OF ARGUMENT.

I.

A writ of habeas corpus cannot take the place of a writ of error. The alleged fugitive has had his hearing and habeas corpus is available only to determine whether the offense charged is a treaty crime and whether there was any evidence warranting the finding that there was reasonable cause to believe the accused guilty.

Fernandez v. *Phillips*, 268 U. S. 311.

(A) THE PROCEEDING IS NOT TO BE CONDUCTED IN A TECHNICAL SPIRIT. THE OBJECT IS TO REACH A CORRECT CONCLUSION UPON THE MAIN QUESTION,—WHETHER THERE IS REASONABLE CAUSE TO BELIEVE THAT A CRIME HAS BEEN COMMITTED.

Grin v. *Shine*, 187 U. S. 181, 184.
Yordi v. *Nolte*, 215 U. S. 228, 230.
In re Herres, 33 Fed. 167.

(B) THE COMMISSIONER'S DECISION IS CONCLUSIVE IF THERE IS ANY EVIDENCE WARRANTING HIS FINDING.

Ornelas v. *Ruiz*, 161 U. S. 502, 507.
McNamara v. *Henkel*, 226 U. S. 520.
Elias v. *Ramirez*, 215 U. S. 398.
Ex parte Zentner, 188 Fed. 344.
Terlinden v. *Ames*, 184 U. S. 270.
In re Krojanker, 44 Fed. 482.
In re Heinrich, 11 Fed. Case No. 6323.
In re Oteiza y Cortes, 126 U. S. 330, 334.

II.

The treaty created an unqualified obligation to extradite for the crime in question. No inquiry into the State law is necessary unless there is doubt whether the crime charged is the crime enumerated in the treaty. If this question arises resort may be had to the Asylum Law for the purpose of ascertaining the definition of the treaty crime, and where it appears that the essence of the crime in both countries is substantially the same, even though it may be known by different names and the scope of the liability may be different, it will be adjudged that such is the offense intended by the treaty.

Factor v. *Laubenheimer,* 61 Fed. 2d 626.

Judge Dickinson's opinion—*Geen case,* in appendix to brief, in opposition to petition for certiorari.

Charlton v. *Kelly,* 229 U. S. 447.

Extradition treaty of 1842, Vol. 1 Malloy's Treaties, p. 655.

In re Metzger, 17 Fed. Cases 9511.

Treaty with Uruguay, Vol. 2 Malloy's Treaties, p. 1825.

Elias v. *Ramirez,* 215 U. S. 398, 409.

Bingham v. *Bradley,* 241 U. S. 511.

In re DuBrocka y Paniagua, 33 Fed. 2d 181.

(A) THE FEDERAL STATUTE ON EXTRADITION DOES NOT REQUIRE LOCAL CRIMINALITY.

Sec. 651, Title 18, U. S. C. A.

Grin v. *Shine,* 187 U. S. 181.

(B) THE TREATY OF 1889, ADDING THE OFFENSE CHARGED, DOES NOT REQUIRE LOCAL CRIMINALITY.

Malloy's Treaties, Vol. 1, p. 740.
Charlton v. *Kelly*, 229 U. S. 447, 467.

(C) THE CRIME IN THE TWO COUNTRIES NEED NOT HAVE THE SAME NAME NOR BE CO-EXTENSIVE IN SCOPE.

Wright v. *Henkel*, 190 U. S. 40, 58, 61:
Benson v. *McMahon*, 127 U. S. 457, 462, 466.
Collins v. *Loisel*, 259 U. S. 309, 311.
Kelly v. *Griffin*, 241 U. S. 6, 14.
Pettit v. *Walshe*, 194 U. S. 205.
Powell v. *United States*, 206 Fed. 400.
In re Greene, 7 Can. Crim. Cases, 389.
In re Greene, 9 Can. Crim. Cases, 254.
In re Greene, 10 Can. Crim. Cases, 154.
U. S. v. *Greene and Gaynor*, 146 Fed. 766.
U. S. v. *Greene and Gaynor*, 154 Fed. 401.
King v. *Dix*, 18 Times Law Rep. 231.
Regina v. *Ganz*, 46 Law Times Rep. 247.
In re Arnton, 1 Q. B. 509 (1896).
Queen v. *Governor of Prison at Halloway*, 16 Times Law Rep. 247.
Ex parte Thomas, 38 Dom. Law Rep, 716.

III.

The complaint meets the requirements of the treaty and the Federal Statute.

Yordi v. *Nolte*, 215 U. S. 227, 230.
Grin v. *Shine*, 187 U. S. 181, 188, 189.
Rice v. *Ames*, 180 U. S. 371, 378, 379.
Terlinden v. *Ames*, 184 U. S. 270, 279.
Ornelas v. *Ruiz*, 161 U. S. 502, 509.
In re Roth, 15 Fed. 506.
In re Adutt, 55 Fed. 376.

IV.

The essential character of the act of receiving money knowing it to have been fraudulently obtained is criminal under the laws of the State of Illinois, and by virtue of the Penal Code of the United States.

(A) THE ILLINOIS STATUTE MAKING CRIMINAL THE TRANSFER AND RECEIPT OF PROPERTY FOR THE PURPOSE OF DEFRAUDING THIRD PERSONS TO WHOM THE TRANSFEROR IS LIABLE, COVERS THE ACT CHARGED.

Section 294, Chap. 38, Ill. Rev. Statutes.
27 Corpus Juris, 476.
Walradt v. *Brown*, 6 Ill. 397.
Wright v. *Henkel*, 190 U. S. 40.

(B) THE ILLINOIS STATUTE ON RECEIVING STOLEN PROPERTY COVERS ALL TRANSFERS WHERE THE ORIGINAL CRIME IS A FORM OF LARCENY OR EMBEZZLEMENT. THE BROAD STREET PRESS FRAUDULENTLY OBTAINED PROPERTY BY METHODS WHICH IN ILLINOIS WOULD BE RECOGNIZED AS FORMS OF LARCENY AND EMBEZZLEMENT SO AS TO MAKE FACTOR GUILTY UNDER THE ILLINOIS RECEIVING STATUTE.

Sec. 239, Chap. 38, Ill. Revised Statutes, 1931.

(1) *Larceny is committed where one obtains possession of the property of another, but not the title thereto, by means of a trick. Where a broker or agent has been given possession of property, conversion thereof amounts to larceny.*

Sec. 380, Chap. 38, Ill. Revised Statutes, 1931.
Sec. 388, Chap. 38, Ill. Revised Statutes, 1931.
36 Corpus Juris, 774.
Sec. 287, Chap. 32, Ill. Revised Statutes, 1931.

(C) *Under the Criminal Code of the United States anyone receiving money knowing it to have been feloniously obtained is guilty.*

Sec. 467, Title 18, U. S. C. A.
Sec. 339, Title 18, U. S. C. A.

V.

In the case of Kelly v. Griffin, 241 U. S. 6, this Court held (p. 15) that it was criminal by the laws of Illinois to receive money knowing it to have been fraudulently obtained.

VI.

The Dawes-Simon Treaty has not come into force in view of the provision therein that it shall not come into force until ten days after its publication in conformity with the forms prescribed by the laws of the high contracting parties.

In re Metzger, 17 Fed. Cas. No. 9511.
8 Butterworth's Compiled Statutes of England, 1929.
Doe v. *Braden*, 51 U. S. (16 How.) 635.

(A) EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT THE DAWES-SIMON TREATY IS IN FORCE IT CANNOT ABROGATE THIS PROCEEDING.

Ex parte Dove, 49 Fed. (2d) 816.
Armstrong v. *Bidwell*, 124 Fed. 690, 692, 694.
Shepard v. *N. W. Life Ins. Co.*, 40 Fed. 341, 347.
Kenton v. *Pontalba*, 40 La. Rep. 342.
Welander v. *Hoyt*, 176 N. W. 594 (Ia.).

(B) VIEWED AS A STATUTE THE DAWES-SIMON TREATY WOULD NOT AFFECT PENDING PROCEEDINGS, BECAUSE IT IS MERELY A REVISION OF THE OLD TREATIES AND HENCE INAPPLICABLE TO PENDING PROCEEDINGS.

Great Northern Ry. Co. v. *U. S.*, 155 Fed. 945.
Merlo v. *Coal Mining Co.*, 258 Ill. 328.
Black on Construction and Interpretation of Laws, (2d ed.) pp. 424, 584.
59 Corpus Juris, 1181, 1184, 1191.
Spear on Extradition (2d ed.) 117.
Terlinden v. *Ames*, 84 U. S. 270.
Stevens v. *Griffith*, 111 U. S. 48.
Williams v. *Bruffy*, 96 U. S. 176.
26 R. C. L. 926.
New Orleans Company v. *Louisiana Company*, 125 U. S. 18.
59 Corpus Juris, 1223.

ARGUMENT.

I.

A writ of habeas corpus cannot take the place of a writ of error. The alleged fugitive has had his hearing and habeas corpus is available only to determine whether the offense charged is a treaty crime and whether there was any evidence warranting the finding that there was reasonable cause to believe the accused guilty.

Fernandez v. *Phillips,* 268 U. S. 311.

(A) THE PROCEEDING IS NOT TO BE CONDUCTED IN A TECHNICAL SPIRIT. THE OBJECT IS TO REACH A CORRECT CONCLUSION UPON THE MAIN QUESTION, WHETHER THERE IS REASONABLE CAUSE TO BELIEVE THAT A CRIME HAS BEEN COMMITTED.

(B) THE COMMISSIONER'S DECISION IS CONCLUSIVE IF THERE IS ANY EVIDENCE WARRANTING HIS FINDING.

The authorities hereinafter referred to indicate the liberal and sympathetic view with which this Court has at all times dealt with cases of extradition. So far as we are aware this Court has never discharged a fugitive after he has been held for extradition. On two occasions the Court has reversed lower Courts which discharged committed fugitives. *Ornelas* v. *Ruiz,* 161 U. S. 502; *Elias* v. *Ramirez,* 215 U. S. 398. In fact the only case in which a demanding government has been unsuccessful in this court is that of *Pettit* v. *Walshe,* 194 U. S. 205, but the question involved was simply whether a fugitive from Great Britain arrested on an extradition warrant issued in New

York could be apprehended in Indiana and returned to New York for the hearing.

In *Grin* v. *Shine*, 187 U. S. 181, the Court refers to the necessity of extradition treaties and observes that they should be faithfully observed and interpreted. The Court says, page 184:

> "In construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, viz., submit themselves to the laws of their country. * * * A proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community is rather to be welcomed than discouraged."

In the same spirit was written the opinion in the case of *Yordi* v. *Nolte*, 215 U. S. 228, 230.

In re Herres, 33 Fed. 167, the Circuit Court, in reversing the District Court, observes that in these extradition proceedings the substance and not the form should be the main object of inquiry and they should not be conducted in technical spirit with a view to prevent extradition. Between governments, as between individuals, the Golden Rule is both wise and sound.

In the case of *Ornelas* v. *Ruiz*, 161 U. S. 502, it is pointed out that the Courts have no direct power of review, but the Court may only inquire:

"Whether the commissioner acquired jurisdiction of the matter by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrants his conclusion. * * *"

Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence and is final for the purposes of the preliminary examination unless palpably erroneous in law."

The Court then says that the Commissioner "*had jurisdiction of the person and of the subject-matter if, on the evidence, the offenses charged were within the terms of the treaty.*"

In the case of *Terlinden* v. *Ames*, 184 U. S. 270, the Court, after stating that whether an extraditable crime has been committed is a question of mixed law and fact and that the magistrate's decision cannot be reviewed, says at page 280:

"Necessarily this is so, for where jurisdiction depends on the merits, the decision is not open to collateral attack involving a retrial, although if on the whole record the findings are contradicted, the inquiry as to the matter of jurisdiction may be entertained. * * * If he had jurisdiction, the district court

> could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offenses was charged."

The courts, recognizing that no right of review of the Commissioner's findings has been given to them, have steadfastly stressed the finality of the Commissioner's findings. So long as the crime involved is the treaty crime and there is some evidence from which the Commissioner might arrive at the conclusion that the crime charged has been committed, the courts ought not to interfere. If the Commissioner has erred, the Secretary of State has the power to refuse to surrender the fugitive.

In the case of Alexander Heilbronn, 12 N. Y. Legal Obs. 65 (cited with approval in *In re* Heinrich, 11 Fed. Cas. No. 6323) the Judge remarks:

> "Where there is any legal evidence before the Commissioner to establish the charge, and that legal evidence is deemed by him sufficient, no matter how many others may deem it insufficient, and he grants a warrant for commitment, that commitment must stand, and no judge has a right to disregard it, or to render it ineffectual."

It has been held that even though the Judge hearing the habeas corpus proceeding might have arrived at a different conclusion than that which the committing Magistrate has come to, the latter's decision should not be disturbed. *Ornelas* v. *Ruiz,* 161 U. S. 502, 507; *McNamara* v. *Henkel,* 226 U. S. 520; *Terlinden* v. *Ames,* 184 U. S. 270, 278, 279, 289; *In re* Oteiza y Cortes, 136 U. S. 330, 334; *Ex parte* Zentner, 188 Fed. 344; *In re* Krojanker, 44 Fed. 482; *In re* Heinrich, 11 Fed. Case No. 6323.

These authorities mark the limit of the review permitted by a habeas corpus proceeding. In this case it

is not disputed that a treaty crime has been charged. Whether admitted or not, the fact remains that the decisions in the *Klein* and *Geen cases* and the act of the Secretary of State in surrendering these fugitives, are conclusive on this issue. The evidence discloses that it is a crime punishable in England. There is no dispute on that issue. It is not contended that the Commissioner was not duly authorized to act in extradition cases. It is not contended that the evidence was not duly authenticated so as to be properly receivable in evidence. Irrespective of whether or not a corresponding crime is an essential feature of the case, the fact remains that the Commissioner found a statute which he felt adequate on that issue and the question whether an extraditable crime has been charged, being one of mixed law and fact, we believe that the decision of the Commissioner on the ultimate question is final and not open for review except by the Secretary of State.

II.

The treaty created an unqualified obligation to extradite for the crime in question. No inquiry into the State law is necessary unless there is doubt whether the crime charged is the crime enumerated in the treaty. If this question arises resort may be had to the Asylum Law for the purpose of ascertaining the definition of the treaty crime, and where it appears that the essence of the crime in both countries is substantially the same, even though it may be known by different names and the scope of the liability may be different, it will be adjudged that such is the offense intended by the treaty.

We contend that where, as here, there is no dispute that the crime charged is the treaty crime, an inquiry into the

local law is unnecessary. Resort to the local law only serves the function of assisting in the determination whether the crime charged is the treaty crime. We urged this point to the Circuit Court of Appeals, whose reply was:

> "However plausibly or even convincingly these contentions are supported, an insuperable obstacle to our acceptance of them is the fact that the United States Supreme Court has held otherwise. *Collins* v. *Loisel*, 259 U. S. 309; *Kelly* v. *Griffin*, 241 U. S. 6; *Wright* v. *Henkel*, 190 U. S. 40."

Judge Dickinson, who decided the *Geen case*, was persuaded to this interpretation. See his opinion in appendix to respondents' brief in opposition to the petition for certiorari.

We do not believe that the precise question now before the Court was present in those cases. In none has the Court ruled that a failure of the asylum state to have a law denouncing the treaty offense as criminal, will result in a failure of the treaty. Never has the Court been confronted with a case where it was contended that no asylum law existed denouncing the treaty crime. This Court has not ruled that a municipal law, or lack of it, can impair an obligation created by the supreme law of the land.

All that the Court has ruled has been that the presence of a local statute defining substantially the crime alleged and proved is sufficient for the purpose of establishing the fact that a treaty crime has been charged. The purpose of the inquiry into the local law is for a definition of the crime named in the treaty and is not for the purpose of limiting the obligation to extradite for some crime which indisputably the parties had in mind in making the treaty; otherwise it was purposeless to include it. Doubt of the

existence of the crime would have been resolved at the time the treaty was drawn up and it would not have been included. The presence of the crime in the treaty is irrefutable proof that there is such a crime. What its definition is may properly be the subject of inquiry. The setting up of one test, namely the local law, for solving the intent, does not exclude the right to apply other tests, if necessary. The question in the *Factor case* is academic rather than real, for it is not contended that we have not charged the treaty crime.

We do not believe that in the adjudicated cases, in the treaty or in the statute there is anything inherently opposed to this view. On the contrary, if this view is not the intended one, we have to reconcile some very startling results.

Let us assume, for the sake of argument, that the crime now charged is not one recognized as criminal under the laws of the State of Illinois or by any Federal statute of general application, still we must admit that it was considered criminal in the *Klein case* because it was agreed that New York had a statute denouncing the particular crime as criminal. Is it conceivable that the operation of the treaty rests in the discretion of the fugitive? May he, by passing from one state to another, create or destroy the obligation? Is he entitled to immunity from prosecution (especially where he is an alien), whereas a citizen of the United States who is found in New York would be subject to extradition? We believe such an interpretation would be unconstitutional. The treaty itself, if operative in this discriminatory way, would be unconstitutional. If the governments intended that the treaty was operative only as regards certain states of the Union the treaty would have been drawn accordingly. Is it fair to hold Great Britain to a compliance with the

treaty to surrender all fugitives found in that country who have fled from this country charged with the offense of receiving money knowing it to have been fraudulently obtained, and at the same time to deny Great Britain the extradition of an alien simply because he has cunningly surrendered himself in a state where he alleges the particular acts are not made criminal in so many words? Since Great Britain can be called upon to surrender fugitives charged with this offense, the only way the treaty can be given that mutuality which was intended is to construe our obligation as covering a person regardless of the state in which he is found. Are we, by virtue of the lack of uniformity in our criminal law, as brought into bold relief by the present situation, to serve notice upon the world that hereafter in dealing with the United States it is incumbent upon foreign nations to inquire into the laws of each state to ascertain whether this government can in fact fulfill its contract?

There is another thought suggested by this situation. Let us assume that it was recognized that some of these offenses were not criminal under the laws of every state, but nevertheless that they were criminal under the laws of Great Britain, we might very well have agreed, as apparently we did, to extradite for the enumerated offense irrespective of criminality in this country. The obligation would not need to have been expressed any differently than it was. In fact, very clear language was employed. The treaty between the United States and Italy has been interpreted by the latter country as not requiring it to surrender to this country its own citizens. However, the United States, in spite of this lack of mutuality, has felt compelled by the language of the treaty, to surrender the citizens of this country upon the demand of Italy. *Charlton* v. *Kelly*, 229 U. S. 447.

We do not believe it was ever intended by the makers of the treaty that an inquiry should be conducted to determine whether what they named as crimes were in fact such. They drew a contract, and where its meaning is called into question the same rules were intended to govern it as are applicable to any other contract. When Mr. Webster and Mr. Ashburton met to draft the treaty of 1842, we must assume that they were aware that international law did not recognize any duty on the part of a nation to surrender a fugitive in the absence of a treaty; that the purpose of the meeting was to agree upon a contract making this duty obligatory as to certain crimes; that it was the accepted view that an extradition treaty ought to enumerate only offenses of a grave and serious nature; and that when they called these offenses "crimes" they used the word advisedly, and did not intend that the failure of any state to denounce the enumerated offenses as criminal was to destroy the obligation which they created. Being in accord on these things, they set down their agreement as follows:

> "It is agreed that the United States and Her Britannic Majesty shall, upon mutual recognition by them or their ministers, officers or authorities respectively, deliver up to justice all persons who, being charged with the *crime* of murder, or assault with intent to murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other" (Vol. 1, Malloy's Treaties, p. 655).

Each representative was unwilling that the surrender should take place upon mere surmise that a crime had been committed. Neither country had any law to implement such a treaty. The rules and procedure governing the or-

dinary preliminary hearing as known in the respective countries suggested a guide for determining whether there was probable cause to believe that a crime had been committed. Hence the negotiators added to their said agreement the following:

> "Provided, that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

The only case in which the point has been directly passed upon whether this proviso limits the agreement which precedes it by requiring an asylum law is *In re* Metzger, 17 Fed. Cases No. 9511. Judge Betts, an experienced jurist in extradition matters, said, page 237:

> "The other points debated on this hearing are of a diplomatic character, and it is the province of the president, at least in the first instance, to decide them

at his discretion. Whether the government is bound by the treaty compact to deliver up the accused, for offenses committed by him in France which are *not crimes by our laws,* whether he is within the description of persons named in the treaty as subject to extradition, whether," etc., etc., "are considerations addressed to the *political department of the government.* (p. 238):

The first position is, that the true construction of the treaty in connection with the proviso to the first article is that a person is not subject to extradition unless the facts proved against him constitute *in the country where he is arrested,* one of the crimes in the treaty. In the present case, I do not think sufficient evidence has been produced, to establish probable cause of suspicion that the crime of forgery *defined* by *our laws* has been committed by the accused. The exemption of the accused for this cause was urged with great confidence by his counsel, but the point does not impress my mind as resting upon a just exposition of the treaty, or demanding of me more than a brief statement of the reasons which prevent my acceding to that interpretation. The preamble expounds clearly the motives upon which the convention was founded. Each nation was desirous that malefactors should find no shelter in the territories of one, against punishment for crimes committed within the dominions of the other, and the high contracting parties manifest most unequivocally their intention to remove fugitives from their place of refuge in order to bring them within the operation of the laws they have violated. The purpose of each was to maintain the justice of their own country; and secure the sanctions of their laws within their respective dominions. To attain this ob-

ject, the commission of the privilege is made mutual and reciprocal, each engaging to deliver to the justice of the other, persons who being accused of the crimes enumerated, committed within the jurisdiction of the requiring party, should seek an asylum or be found within the territories of the other. The terms employed in the treaty appear to me to carry out this purpose with a clearness and precision which scarcely admit of misconstruction. I should also infer that the proviso which is claimed to include the qualification urged in behalf of the prisoner was framed *ex industria* to avoid the construction sought to rest upon it. As in the body of it the observance of the laws of the place of refuge is exacted, in pursuing the apprehension and detention of the fugitive, it appears to have been thought expedient to mark by definite directions, that those laws were to furnish *the method of procedure only*, for it is declared that they shall be applied to the investigation abroad, as 'if the crimes had been committed' where the arrest was made. The matter to be inquired into and adjudged obviously is, therefore, *the fact of the commission of the crime charged, within the dominions of the party requiring the surrender of the fugitive;* and accordingly the *laws of France* afford the basis of the inquiry in this case, and not those of the United States." (Italics ours.)

The proviso in the Treaty of 1842 established a rule as to the kind and type of evidence that was receivable in support of the charge. As time went on and the varying procedural rules of the several states became apparent, Congress in 1848, determined it expedient to place the question of evidence on a purely reciprocal basis. In con-

sequence, it enacted a law that this country would receive in support of an extradition charge such evidence as the demanding Government would receive for a similar purpose. This did not dispense with the necessity of the proviso, which was included in later treaties, although it was omitted from the treaty with Uruguay (Vol. 2, Malloy's Treaties, p. 1825). The proviso was still necessary because the application of the statute was dependent upon similar legislative action in the foreign countries. We find the requirements of the proviso establishing the local law as a rule governing evidence and procedure relaxed by the Federal statute. Thus, for instance, in *Collins* v. *Loisel*, 259 U. S., a Louisiana state statute was held not to govern the character of instruments of evidence. In *Elias* v. *Ramirez*, 215 U. S. 398, 409, local practice would have excluded the hearsay evidence that was held competent. In the case of *Bingham* v. *Bradley*, 241 U. S. 511, it was held that the Federal statute controlled and that the accused, regardless of local law, was not entitled to confront his accusers. *In re*: Dubroca y Paniagua, 33 Fed. (2d) 181, extradition was granted in spite of the fact that the proof of seduction was not corroborated, although the Pennsylvania law required this.

(A) THE FEDERAL STATUTE ON EXTRADITION DOES NOT REQUIRE LOCAL CRIMINALITY.

The Federal statute on extradition (Secs. 651 and 655, Title 18 U. S. C. A.), provides that whenever there is a treaty the examining Magistrate may upon complaint, charging any person with having committed any crime provided for by the treaty, issue a warrant for the apprehension of the person so charged, in order that there may be a hearing

"to the end that the evidence of criminality may be heard and considered. If on such hearing he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify to same * * * to the Secretary of State."

It will be noted that there is no requirement in this statute of local criminality. Even if the treaty provided for such an inquiry, it has been waived by this statute. In the case of *Grin v. Shine*, 187 U. S. 181, it was contended that a warrant had not been issued in Russia, as required by the treaty. The Court said:

"It is within the power of Congress to dispense with this requirement, and we think it has done so, by Rev. Stat., Sec. 5270 hereinbefore cited. The treaty is undoubtedly obligatory upon both powers, and, if Congress should prescribe additional formalities than those required by the treaty, it might become a subject of complaint by the Russian Government and of further negotiations, but notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro v. De Uriarte*, 16 Fed. Rep. 93. This appears to have been the object of Sec. 5270, which is applicable to all foreign governments with which we have treaties of extradition. The requirements of that section, as already observed, are simply *a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under provisions of the proper treaty or convention, a certificate by the magistrate of such evidence and his conclusions thereon to the Secretary of State.* As no mention is here made of a warrant of arrest, or other

equivalent document, issued by a foreign magistrate, we do not see the necessity of its production. This is one of the requirements of the treaty which Congress has intentionally waived. Moore on Extradition, sec. 70." (Italics ours.)

(B) THE TREATY OF 1889, ADDING THE OFFENSE CHARGED, DOES NOT REQUIRE LOCAL CRIMINALITY.

The supplemental treaty of 1889 (Vol. 1, Malloy's Treaties, p. 740), which includes the crime here charged, has been so drafted as to avoid any provision in the treaty of 1842, if it exists, that local criminality is essential to extradition. A restrictive clause was employed as regards certain crimes, and omitted as to others. The offenses are enumerated as follows:

1. Manslaughter, when voluntary.

2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

5. Perjury, or subornation of perjury.

6. Rape; abduction; child-stealing; kidnapping.

7. Burglary; house-breaking or shop-breaking.

8. Piracy, the law of nations.

9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel

at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries.

In subsequent treaties, the contracting parties added the crimes of obtaining money by false pretense, procuring an abortion, and child abandonment, and imposed no restriction that they must be criminal by the laws of both countries. Other crimes embraced in those same supplemental treaties, namely, bankruptcy offenses, narcotic offenses and acts of bribery, were extraditable only if criminal by the laws of both countries. (See Vol. I, Malloy's Treaties; Treaty 1842, p. 655; 1889, p. 780; 1900, p. 780; 1905, p. 799.)

The absence of the restrictive clause cannot be ignored, but must be given due effect. It is apparent that the parties agreed that all the other offenses therein named were crimes under the laws of their respective countries and that they therefore intended to extradite fugitives charged with having committed such crimes. We cannot infer that the framers of this treaty needlessly put in the restrictive clause if the treaty of 1842 already required that all offenses must be criminal by the laws of both countries. See in this connection *Charlton* v. *Kelly*, 229 U. S. 447, 467. Nor has this government, by the omission of the restrictive clause, lost its right in a given case to question whether the crime charged is in fact the one intended by the treaty. The matter is one involving the interpretation and construction of contracts. Where the restrictive clause

is used, it devolves upon the demanding government as a part of its case to show that the crime charged is "made criminal by the laws of both countries," a duty not existing, at least in the first instance, where the crime charged is one from which the restrictive clause has been omitted.

(C) THE CRIME IN THE TWO COUNTRIES NEED NOT HAVE THE SAME NAME NOR BE CO-EXTENSIVE IN SCOPE.

The first case cited by opposing counsel is *Wright* v. *Henkel,* 190 U. S. 40, 61. This authority refutes opposing counsel's contention that local criminality is required by the proviso of the Treaty of 1842. In this case the Court had under consideration a crime added by the Treaty of 1889, designated as follows:

> "4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, *made criminal by the laws of both countries.*"

It will be seen on page 58 of the opinion that the Court rests the requirement of local criminality upon the restrictive clause "made criminal by the laws of both countries," and not upon the proviso in the Treaty of 1842. Local criminality being an essential element, as required by the Treaty of 1889, the Court sets down the rules by which this correspondency is to be determined.

> (p. 61) "But it is enough if the particular variety was criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.
>
> In *Grin* v. *Shine,* 187 U. S. 181, we applied the definition of embezzlement given by the laws of California; but there the petitioner himself appealed to that definition, and the case, though in many respects

of value here, did not rule the precise point before us.

But we rule it now and concur with Judge Lacombe, that when, by the law of Great Britain, and by the law of the state in which the fugitive is found the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes.

(p. 58) The making of such a false statement knowingly, under the New York Act, carries with it the inference of fraudulent intent; but, even if this were not so, criminality under the British Act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same and made criminal by both statutes."

It is apparent from a reading of this case, that what the Court was seeking to do was to ascertain what crimes were intended by the language employed in the treaty. Again the Court remarks (p. 60):

"Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As, for instance, as to the slave trade; though criminal, yet, apparently because there had been peculiar local aspects the crime was required to be against the laws of both countries; and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times."

This authority, therefore, does not go as far as opposing counsel would interpret it. It is distinguishable from

the case at bar in that the crime charged was one which, by the treaty itself, was required to be criminal by the laws of both countries. And it is further distinguishable in that there was a question whether the crime charged was the crime intended by the treaty. Neither question is present in the case at bar.

Furthermore the Court refers (p. 58) to the fact that a similar crime may be found in the statutes of several of the States and Alaska, and that the federal statute regarding national bank officers was of similar import. We deem this remark of great significance as indicative of the fact that the controlling question is simply one of intent, viz., is the crime charged the one intended by the treaty. The reference also anticipates the occasion when there might be an absence of a similar law in the State in which the fugitive is found. In such a case the Court would ascertain the definition of the treaty crime by reference to the laws of the several States of the Union, having said that the laws of this country include the laws of its component parts (p. 61).

In the case of *Collins* v. *Loisel*, 259 U. S. 309, the question again appears whether the crime charged was the treaty crime. It was contended by the fugitive that the offense with which he was charged was cheating only and therefore did not come within the crime of "false pretense," which was the treaty crime. The Court remarks (p. 311):

> "It is true that an offense is extraditable only if the acts charged are criminal by the laws of both countries."

We do not understand the Court as implying by this language that the question of the criminality of the offenses was not decided when the crimes were enumerated in the

treaty. The local law is resorted to for the purpose of ascertaining the definition of the crime named in the treaty but not for the purpose of destroying the obligation if it is agreed that the treaty crime has been charged. In such a case the Court says:

> "The law does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of the liability shall be co-extensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. This was held with reference to different crimes involving false statements in *Wright* v. *Henkel,* 190 U. S. 40, 58, 47 L. ed. 948, 954, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386; *Kelly* v. *Griffin,* 241 U. S. 6, 14, 60 L. ed. 861, 864, 36 Sup. Ct. Rep. 487; *Benson* v. *McMahon,* 127 U. S. 457, 465, 32 L. ed. 234, 237, 8 Sup. Ct. Rep. 1240, and *Greene* v. *United States,* 85 C. C. A. 251, 154 Fed. 401. Compare *Ex parte* Piot, 15 Cox, C. C. 208, 48 L. T. N. S. 120, 47 J. P. 247. The offense charged was, therefore, clearly extraditable."

The fugitive contended that the evidence did not prove him guilty of the treaty crime of obtaining money by false pretenses, but that at most common law cheating only was shown, and the Court's answer as to this was (p. 314), that it was not the function of the committing magistrate to determine whether Collins was guilty. Mark the liberal approach of this Court upon the question of criminality and note the result of that holding. In India, where the crime was committed, it amounted only to common law cheating. Nevertheless, the Court recognized it as coming within the treaty offense of obtaining money by false pretenses, since the evidence showed the commission of

this offense. The implication of the decision is simply that the local law was resorted to for the purpose of ascertaining what was intended by the treaty in enumerating the crime of obtaining money by false pretenses. This is a very proper test, but it is certainly not the exclusive test. This case emphasizes the broad interpretation which this Court has given extradition treaties in recognition of our obligation to assist in bringing a fugitive to trial in the country where he has committed the crime.

In the case of *Pettit* v. *Walshe*, 194 U. S. 205, the questions engaging the Court's attention were entirely different from the one in the case at bar. At the very outset of the opinion the Court said that the question involved was whether a Commissioner can issue a warrant which shall be valid in a district other than his own and whether a person arrested under such warrant can be taken beyond the state in which he was found and delivered into the state before the officer who issued the warrant. The Court holds that the proviso in the Treaty of 1842 requires that a hearing be had in the state where the fugitive was found. The proviso is said to call for such *evidence* of criminality as would justify the commitment of the fugitive in the place where he is found. The Court does not rule that the proviso requires a definition of the crime by the local law. As stated by the Court in *Grin* v. *Shine*, 187 U. S. 181, 188:

> "We do not deem it necessary to inquire whether the words 'evidence of criminality' include a definition of the crime charged or to determine by what law the elements of the crime of embezzlement are fixed. Moore on Extradition, sec. 344. As the petitioner has sought to apply the *definition of embezzlement given in the laws of California as likely to be most favorable to himself, and the prosecution has assented to*

this view, we assume for the purposes of this case that this is the definition contemplated by the treaty.'' (Italics ours.)

In the case of *Powell* v. *U. S.*, 206 Fed. 400 (C. C. A.), the Court holds that verbal identity is not necessary.

The latitude which the courts have permitted in determining whether the crime charged is a crime under the laws of both the demanding government and the asylum country is well illustrated in the opinions involving Gaynor and Greene, who fled from the United States to Canada. They were charged in the United States with conspiracy with one Oberlin Carter to defraud the United States. The complaint made before Commissioner LaFontaine in Canada charged the accused with participation in fraud by an officer and participation in embezzlement. Judge Caron discharged them on the ground that this was an attempt to circumvent the treaty, which did not enumerate conspiracy as an extraditable offense. His opinion appears in 7 Can. Crim. Cases 389. It may be here remarked that the Court of Appeals, in the *Klein case,* 50 Fed. (2d) 687, on the basis of this Canadian authority, said that it may be conceded *arguendo* that conspiracy to defraud is not within the treaty. The Court of Appeals was not, however, aware of the fact that this opinion was reversed by a decision of the Lord Chancellor of England (9 Can. Crim. Cases 254). In the Privy Council which heard the appeal from Judge Caron's decision it was held that because the indictment was for conspiracy the demanding government was not deprived of the right to extradite for the overt acts of larceny. After the reversal of Judge Caron's decision Commissioner LaFontaine held the accused for extradition. Judge Ouimet thereafter heard an application for a writ of habeas corpus (10 Can. Crim. Cases 154).

The significant feature of the case as thus far disclosed is the fact that although the charge in the United States was conspiracy, the Canadian Government permitted extradition for treaty offenses of a different nature. The gist of conspiracy is the agreement and is vastly different from the overt acts recognized as extraditable under the treaty.

On their return to the United States Gaynor and Greene moved to quash the indictments charging conspiracy on the ground that this was a different offense from that for which they were surrendered. Judge Spear, the trial Judge, delivered a very able opinion, which traces the development of a feeling of mutual respect between the two governments out of which has grown a very liberal view toward extradition. He says that the purpose of the treaties was to accomplish extradition and trial on the merits. He reaches the conclusion that the indictment for conspiracy cannot be said to be an indictment for a crime different from the ones for which these accused were surrendered, namely, participation in fraud by an agent and participation in embezzlement (146 Fed. 766). It will be recalled that the treaty provides that no surrendered person shall be tried for a crime different from that for which he is extradited. As applied to the *Factor case* it seems to us that this decision commits the United States to such a broad interpretation of the treaty that if Factor could be held for conspiracy under the Illinois law any requirement of local criminality is fulfilled. Moreover, if this proposition is conceded, there are a number of other statutes equally applicable. In fact, the Circuit Court of Appeals in the case at bar very properly observed that Factor could no doubt be held under the Illinois Conspiracy Statute, which probably would be sufficient. We believe this holding of the court was entirely correct.

Judge Spear's action was sustained by the Circuit Court of Appeals in *U. S.* v. *Greene and Gaynor,* 154 Fed. 401, where it is said, at page 405:

> "The indictments in question plainly charge the identical corrupt and fraudulent agreement or conspiracy for which the Extradition Commissioner committed the defendants, holding that such acts constituted participation by conspiracy in fraud committed by an agent or trustee. The indictments charge, as do the proceedings in Canada, a corrupt agreement or conspiracy to defraud the United States; that the conspiracy was between the defendants and Oberlin M. Carter, an officer and agent of the United States, and that the purpose was to defraud the United States in the discharge of the duties of his office; that the fraud concerned money intrusted and to be intrusted to Carter as such officer and agent, etc. It is not possible to read the indictments and the proceedings leading up to the extradition and not see that both charge and relate to the same acts and transactions as constituting an offense against the laws of the United States. It is contended by counsel that the extradition is for participation in fraud by an agent or trustee, and that the first and second indictments are for conspiracy. That is true, but it is not the whole truth. The conspiracy charged in the indictment is a conspiracy with an agent to defraud. The acts of the defendants charged as constituting the participation in fraud in the extradition are the same acts charged as a conspiracy to defraud in the indictments. While the extradition and the indictment must be for the same criminal acts, it does not follow that the crime must have the same name in both countries. The same crime often has different names in different countries.

If the act in question is criminal in both countries and is within the terms of the treaty, nothing more is required. *In deciding whether the indictment charges the same offense for which the defendants were extradited, the acts of the defendants alleged in the two proceedings must be considered. It is not a question of names.* The technical niceties and distinctions recognized sometimes in criminal law as making a fatal variance cannot be applied. *Cohn* v. *Jones* (D. C.) 100 Fed. 639; *State* v. *Spiegel,* 111 Iowa, 701, 83 N. W. 722; *State* v. *Rowe,* 73 N. W. 833, 104 Iowa, 323; *In re* Cortes (C. C.) 42 Fed. 47. It is held that one extradited by the Mexican government as an accomplice may be, on the same facts, indicted and tried as a principal, the distinction between principals and accessories being abolished by local statutes. *In re* Rowe, 77 Fed. 161, 23 C. C. A. 103. In *Bryant* v. *United States,* 167 U. S. 104, 108, 17 Sup. Ct. 744, 42 L. Ed. 94, a fugitive from justice was charged under the treaty between the United States and Great Britain with the crimes of forgery, larceny, and embezzlement and false entries committed in London. The commissioner held the evidence sufficient to warrant the prisoner's commitment for extradition, and committed him generally on the charges made. The prisoner sought release on the ground that as he could only be tried for the particular offense for which he was surrendered, the demanding government and the commissioner should have elected and that, if the latter deemed the evidence sufficient to commit upon the one, he should not have been committed upon the other. Responding to the objection, the Supreme Court said:

'So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny, or embezzlement. That is a matter of practice with which we have nothing to do.'

So the Canadian authorities considered and decided this case. They surrendered the defendants to be tried upon 'The facts which appeared in evidence before the commissioner,' and it was immaterial what practice or form of indictment was used in the courts of this country so long as the defendants were tried here for the same offense and upon the same facts. The defendants are tried, within the meaning of the treaty, for the same offense when they are tried for the same acts and for the same charge set out in the demand and shown by the evidence presented to the commissioner.

We are of opinion that the record shows that the first and second indictments charge the defendants with an offense for which they were extradited." (Italics ours.)

The Court then remarks that the effect of a treaty of extradition is not to add to any natural right of asylum which a fugitive has, for he has none. A treaty only provides that each country must deliver up a fugitive for trial for certain specified acts or crimes. It makes it incumbent on a country to do by contract what it might have done by way of comity if no treaty had existed.

This Court refused to review the decisions in the *Green* and *Gaynor cases.*

Opposing counsel say that the case of *Kelly* v. *Griffin*, 241 U, S. 6 clearly states the principle that local criminality is essential. This Court was not called upon to determine this. Both sides assumed it was essential, and local statutes were accordingly cited. However, the fundamental question involved was whether the crimes charged were the treaty crimes. This is illustrated by the objection made to the charge of perjury, it being contended that the Canadian Statute made criminal false swearing with regard to an immaterial fact. In answer to this Mr. Justice Holmes said, (p. 14) "As to this, it is enough to say that the assertions charged here were material in a high degree and that the treaty is not to be named a dead letter because some possible false statements might fall within the Canadian Law that perhaps would not be perjury by the law of Illinois."

The Canadian and English cases have adopted the same liberal interpretation which the Courts of the United States have made in determining whether the crime charged is recognized as criminal under the laws of the asylum country and therefore within the purview of the treaty. *King* v. *Dix*, 18 Times Law Rep., 231; *Regina* v. *Ganz*, 46 Law Times Rep. 596; *Queen* v. *Governor of Prison at Holloway*, 16 Times Law Reports, 247; *In re* Arnton, 1 Q. B. 509 (1896); *Ex parte* Thomas, 38 Dom. Law Rep. 716.

Opposing counsel have cited *In re* Anderson, 11 Upper Canada Common Pleas Reports, 2. In that case the fugitive was charged with feloniously stabbing and killing one Seneca Diggs, of Howard County, Missouri. This was held not to charge the treaty crime of murder. The Canadian Court points out that slavery was not recognized as legal in that country and hence that the resistance put up by the fugitive, in consequence of which his master was

killed, would not be recognized as murder in Canada and therefore could not have been within the purview of the treaty.

In re Windsor, 6 Best & Smith's Rep., 522, is cited by opposing counsel as enunciating the principle which they have set down. This case involved the charge of forgery against the laws of New York, which made a false entry in any corporate book kept by an officer, forgery of the third degree. The Court points out that this was not forgery in the sense in which that term is used in the treaty and in the English Extradition Statute. This feature of the case alone distinguishes it from the case at bar.

The case of *In re* Frank, 107 Fed. 272, cited by opposing counsel held that the fugitive could not be surrendered for an embezzlement of partnership funds. This was a crime in Canada, but the District Judge observes that upon the principle of the common law the general rule is that ownership of the property alleged to have been embezzled must not be in the accused. This he said was also the law of Oregon. As we view the case, the Court simply held that the treaty crime was not charged. It is distinguishable from the one at bar because in the *Factor case* it has been conceded and held that the treaty crime has been charged.

In *U. S.* v. *Rauscher*, 119 U. S. 407, it appears that the fugitive was surrendered for the crime of murder, a treaty crime, but upon his surrender to the United States he was tried for the crime of unlawfully inflicting upon another person cruel and unusual punishment, which was not a treaty crime. This case does not discuss the point as set out in opposing counsel's brief.

In the case of *Benson* v. *McMahon*, 127 U. S. 457, which was an extradition proceeding, it was charged that the

Commissioner did not have jurisdiction to hear the complaint. The Court says, page 462:

> "In regard to the jurisdiction of the commissioner to hear the complaint, no doubt can be entertained. The offense set out in three or four different forms in the petition of Navarro, the Mexican Consul General, is distinctly that of forgery on the part of Benson; the particular forgery charged is that of the name of Henry E. Abbey, and the time, place and circumstances are detailed with sufficient particularity to comply with the language of the treaty. * * *
>
> (p. 462): The subject of what *proof* shall be required for the delivery upon requisition of parties charged with crime is considered in Article (I) of the treaty, in regard to which it is provided 'that this shall be done only when the *fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed'." (Italics ours.)

Counsel for Benson urged the Court that a common-law cheat, and not a forgery, under the common-law, had been committed. The forgery consisted in the printing of the name of Henry E. Abbey on theatre tickets. It is noteworthy that while the accused was found in New York, its laws were not referred to in ascertaining whether a crime had been committed. This is the very cornerstone of the argument made by Factor's counsel. Benson's counsel contended that at common law the printing of a name could not be forgery. The Court thereupon makes this very pertinent observation (p. 466):

"It certainly does not appear from this that the Mexican authorities intend to be bound in the treaty by any very restricted use of the word 'forgery' when the question concerned an offense of that character committed in Mexico. It is for an offense against Mexican law that the prisoner is held to answer. As he is not now upon final trial, but the only question is whether he has committed an offense for which, according to this treaty, he should be extradited to that country and there tried, we do not see that in this application to set the prisoner at large, after he has been once committed by an examining Court having competent authority, and after having been held to answer in Mexico for the offense charged, that this Court is bound to examine with very critical accuracy into the question as to whether or not the act committed by the prisoner is technically a forgery under the common-law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed and the final success by which the fraud was perpetrated, are undoubted."

The distinctions which opposing counsel have sought to make are of a highly technical nature and are clearly contrary to the spirit with which extradition proceedings ought to be dealt, particularly in a case such as this, where, if extradition fails, legal justice as to this guilty fugitive shall not be done.

III.

The complaint meets the requirements of the treaty and the Federal Statute.

The complaint in this case charges that Factor received money from the Broad Street Press knowing it to have

been fraudulently obtained (Trans. Vol. 1, p. 89). It therefore clearly charges the treaty crime of receiving money knowing it to have been fraudulently obtained. (Vol. 1 Malloy's Treaties, p. 741) In the Treaty of 1842 (Malloy's Treaties, Vol., 1, p. 655) it is provided that the Judges of the respective countries shall have authority "upon complaint made under oath, to issue a warrant for the apprehension of the fugitive so charged," meaning that the person shall be charged with a treaty crime therein enumerated.

The Federal statute provides that whenever there is a treaty any Judge or Commissioner

> "may, upon complaint made under oath, charging any person * * * with having committed * * * any of the crimes provided for in such treaty or convention, issue his warrant" (Sec. 651, U. S. C. A. Title 18).

Opposing counsel have cited no case supporting their contention that the complaint must show an offense under the local law. Their authorities speak of the necessity of its appearing that the act is criminal under the local law, but there is not the slightest suggestion in any of them that a complaint is inadequate which charges a treaty crime. It has not been contended that Factor was not adequately informed by the complaint in this case, and this Court is not reviewing the case for error but to ascertain whether the Commissioner had jurisdiction. Moreover, this very form of complaint was successfully used in both the *Klein* and *Geen* extradition cases.

One of the cases cited by opposing counsel, *In re* John Anderson, 11 Upper Can. Com. Pleas Reports 2, decisively illustrates why it is advisable to employ the language used in the treaty when charging the commission of the offense in the complaint, that is, in order that it may be seen by

the examining magistrate that a treaty crime is being charged. In that case, instead of charging murder, which was a treaty offense, the complaint charged that the fugitive feloniously killed and stabbed one Diggs.

In re Roth, 15 Fed. 506, the Court said:

> "If the complaint were required to be as precise, technical and formal as an indictment, it should perhaps be held insufficient; but this is not the case, and there is no reason for applying to it such a rule. It is only necessary that the substance of the offense be clearly set forth so that the Court can see that one or more of the crimes enumerated in the treaty is alleged to have been committed. *In re* Farez, 7 Blatchford, 48; *In re* Heinrich, 5 Blatchford, 414, 426. Taking this complaint altogether, it plainly answers this requirement."

In the case of *Yordi* v. *Nolte*, 215 U. S. 227, the Court says at p. 230:

> "The complaint should set forth clearly and briefly the offense charged. It need not be drawn with the formal precision of an indictment. * * * The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a more correct decision on the main question—is there reasonable cause to believe that a crime has been committed? If the offense be one of the treaty crimes, and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient to authorize the Commissioner to act, * * *"

Again at page 232:

> "We think the evidence produced at the hearing justified the detention of the accused and corrected

any irregularity in the complaint. As this court said in *Nishimura Ekiu* v. *U. S.*, 142 U. S. 662: 'A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest and commitment' " (Citing cases).

In re Adutt, 55 Fed. 376, the Court said:

"It is of course necessary that the substance of the offense charged should be declared so that the court can see that the particular crime charged is one enumerated in the treaty."

If the accused objects to the lack of particularity his objection to the complaint in this regard should be made to the Commissioner, and the Court says that such an objection is not one that goes to the Commissioner's jurisdiction.

There are relatively few cases dealing with the sufficiency of a complaint in an extradition case because of the fact that it is the substance of the matter which challenges the Court's attention and not merely the form in which the complaint is drawn. See in this connection *Grin* v. *Shine*, 187 U. S. 181, 188, 189; *Rice* v. *Ames*, 180 U. S. 371, 378, 379, which hold that whether an extraditable crime has been charged is a question of mixed law and fact, but chiefly of fact. See also *Terlinden* v. *Ames*, 184 U. S. 270, 279, *Ornelas* v. *Ruiz*, 161 U. S. 502, 509.

In the case of *U. S.* v. *Greene*, 154 Fed. 401, where it was contended that the indictment being for conspiracy, charged a crime different from that for which the fugitive was

surrendered by Canada, viz., participation in fraud by an agent, and embezzlement, the Court says, page 405:

> "In deciding whether the indictment charges the same offense for which the defendants were extradited, the acts of the defendants alleged in the two proceedings must be considered."

We submit that if the complaint in this case is tested by these authorities it cannot be found to be objectionable. Its successful use heretofore, its present freedom from criticism on the grounds of lack of particularity and the function which it is to serve all stamp it as sufficient. Assuming, for the sake of argument, that criminality in the state where the fugitive is found is an essential requisite to extradition, we hardly see how this can be set up as a test for determining the sufficiency of the complaint. Frequently it is not known in what state the fugitive will be found. This Court has ruled that a complaint made in one state is good throughout the United States. *Pettit* v. *Walshe*, 194 U. S. 205. To hold that the complaint which charges a treaty crime must likewise identify the offense by language conforming to the statute of the state where the fugitive was found would be to require the impossible of the demanding government, because in many cases it cannot possibly know in advance which state that will be. This would be in violation of the spirit heretofore prevailing and would certainly require of the demanding government a knowledge of the niceties of our criminal law heretofore said to be unnecessary. We believe the proper question for the consideration of the examining magistrate is whether the facts show a crime intended to be embraced in the treaty. If the proof of this question lies in the existence of an asylum law punishing the acts shown to

have been committed, we believe that both state and Federal statutes denounce the act which Factor is charged with having committed.

IV.

The essential character of the act of receiving money knowing it to have been fraudulently obtained is criminal under the laws of the State of Illinois, and by virtue of the Penal Code of the United States.

(A) THE ILLINOIS STATUTE MAKING CRIMINAL THE TRANSFER AND RECEIPT OF PROPERTY FOR THE PURPOSE OF DEFRAUDING THIRD PERSONS TO WHOM THE TRANSFEROR IS LIABLE, COVERS THE ACT CHARGED.

The statute in question is Section 294 of the Criminal Code of Illinois (Chapter 38, Ill. Rev. Statutes, 1931) and reads as follows:

> "Every person who shall be a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance had, made or contrived, with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages, or who, being a party as aforesaid, at any time shall wittingly and willingly put in use, avow, maintain, justify or defend the same or any of them as true, and done, had or made in good faith, or upon good consideration, or shall sell, alien or assign any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him conveyed as aforesaid, or any part thereof, shall be fined not exceeding $1,000."

Opposing counsel do not deny that this statute covers the receiver as well as the transferor of the property.

It cannot be denied that the words "creditors or others" include those to whom the transferor was liable for fraud, 27 Corpus Juris 476; *Waldradt* v. *Brown*, 6 Ill. 397. This language embraces all persons who have claims against the transferor, whether for libel, slander, misapplication of trust moneys or other tortious acts. We have, therefore, under the English statute and the one under consideration the identical parties here involved, a receiver, a transferor and a class of persons who have been defrauded. As applied to the facts in this case it is clear that the Broad Street Press and its agents were guilty of fraudulently obtaining money. They were consequently responsible to the defrauded persons. Factor received this money from the Broad Street Press and its agents. On such a bare statement of facts, and in view of the fact that this Court does not determine the issue of fact, we believe that the Commissioner's finding is conclusive. Opposing counsel cannot escape these consequences. Their objection to the application of this statute is founded upon an alleged distinction in legislative intent. They object because there are two frauds involved under the Illinois statute, and presumably only one fraud involved under the English statute. Even their own legal expert admitted that if the Broad Street Press had fraudulently obtained property and that in transferring it to Factor there arose a fair inference that it was done to deprive the defrauded persons of their property, Factor would be liable as a receiver under this very Illinois statute (Trans. Vol. 1, p. 586).

In the case of *Wright* v. *Henkel*, 190 U. S. 40, the Court says (p. 58):

> "The British Statute punishes the making, circulating or publishing, with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager or public officer thereof. The New York Statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly under the New York Act carries with it the inference of fraudulent intent; but, even if this were not so, criminality under the British Act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same and made criminal by both statutes."

This language has a striking application to the case at bar as regards the English and the Illinois statutes. The receiving of money for the purpose of depriving the owner of its possession, knowing it to have been fraudulently obtained, carries with it the inference of a fraudulent participation in a fraudulent conveyance.

This interpretation of the Illinois statute as covering the receiving of money knowing it to have been fraudulently obtained, has the sanction of Judge Landis, who decided the case of *Kelly* v. *Griffin*, in the District Court which case later went to this Court (241 U. S. 6). In analyzing the *Kelly case*, wherein appears the ruling that the receiving of money knowing it to have been fraudu-

lently obtained is criminal by the laws of Illinois, we shall make further reference to Judge Landis' ruling. Commissioner Walker who heard the Factor extradition proceedings held that this Illinois statute makes criminal the receiving of money knowing it to have been fraudulently obtained. The Circuit Court of Appeals concurred in this holding.

Opposing counsel cite no authority for their conclusion that fraudulent conveyance statutes are aimed at fake or feigned conveyances. The question in each case is whether the conveyance perpetrates a fraud upon the creditors of the transferor. Outright gifts, mortgages, loans and all types of tranfer having this effect are prohibited. There is clearly no requirement that the transfer shall be simply a feigned or fake one (27 Corpus Juris 450). The Broad Street Press transferred its funds to Factor and received nothing in return. It consequently deprived the defrauded persons of their property and left itself in the position of having no assets out of which their claims might be satisfied. The inevitable effect was a fraudulent transfer.

We are not impressed by opposing counsel's argument that prosecutions were not carried on in England for receiving money knowing it to have been fraudulently obtained, as violations of the Fraudulent Conveyance Act. Likewise do we deem immaterial the fact that that act has been repealed. It may well be that Great Britain considered it desirable to restrict the unlawful receiving of property to those cases where it had been originally obtained by criminal means. Its receiving statute fulfills such a purpose.

Opposing counsel conclude that one charged with being party to a fraudulent conveyance could not be extradited, because this crime is not enumerated in the treaty. The authorities heretofore discussed show that it is the acts

which are to be inquired into and the name is not decisive. There is not the slightest doubt that if a receiver was charged in Illinois under the Fraudulent Conveyance Act and the evidence showed that the property which he took with intent to deprive the owner thereof had been fraudulently obtained, he could be extradited from England.

Bearing in mind that the question of inference is one for the Commissioner, and not for the Court, which is reviewing a collateral attack upon the proceeding, we submit that the Commissioner's finding that the evidence made out a case under this statute is conclusive. We do not see how it could be otherwise. Where one has obtained property by fraud, if he transfers that property he has inevitably committed a further fraud upon the parties. Where a receiver takes property with knowledge of the facts he is inevitably guilty as a party to a fraudulent conveyance.

The Illinois and the English statutes are worded somewhat differently, because under the Illinois statute both the transferor and the receiver are covered, whereas under the English statute only one of the parties is covered, namely, the receiver.

Opposing counsel misstate our position in saying that we claim the transferee's intent is immaterial. We make no such claim. We have said his motive is immaterial, and that it will be presumed that he intended the natural consequences of his act. By receiving the property which the Broad Street Press fraudulently obtained from third persons, and thus making such property unavailable to the defrauded persons, Factor inevitably became a party to an act which hindered and defrauded them within the purview of the Illinois law.

With respect to opposing counsel's contention that there is a difference in legislative intent, we do not believe that such an issue has anything to do with the present inquiry. The question at best is simply whether Factor, having done what he did in England to make himself liable under its statute, could be guilty under this Illinois statute. We think he could. If a difference in legislative intent will deprive statutes of the correspondency alleged to be essential, then we must consider whether extradition may be properly granted for narcotic offenses, which are criminal in Canada and England because of their inherent vice, but which in this country are criminal only because they violate a revenue law. Surely we are not prepared to subscribe to any proposition having this consequence.

Let us examine the Fraudulent Conveyance Statute and a typical receiving statute to ascertain whether there is in fact any difference in the legislative intent. In the State of Illinois we have a statute which says:

> "Every person who, for his own gain or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing * * *."

Thus far the statute on fraudulent conveyances and this statute on receiving stolen property are identical in purpose. The statute which we started to quote was the Illinois statute on receiving stolen property. The purpose of the statute was to punish one who receives property for the purpose of preventing the owner from gaining possession thereof. The Fraudulent Conveyance Statute is directed against this identical thing except that it is more comprehensive in its scope and embraces property obtained in ways other than theft. The purpose of the law was to stop crime. It was intended to make the

commission of criminal acts unprofitable and the purpose of all such statutes is to penalize anyone who assists in making criminal acts profitable where the facts are known.

(B) THE ILLINOIS STATUTE ON RECEIVING STOLEN PROPERTY COVERS ALL TRANSFERS WHERE THE ORIGINAL CRIME IS A FORM OF LARCENY OR EMBEZZLEMENT. THE BROAD STREET PRESS FRAUDULENTLY OBTAINED PROPERTY BY METHODS WHICH IN ILLINOIS WOULD BE RECOGNIZED AS FORMS OF LARCENY AND EMBEZZLEMENT SO AS TO MAKE FACTOR GUILTY UNDER THE ILLINOIS RECEIVING STATUTE.

The Criminal Statute on Receiving reads as follows:

> "Receiving. §239. Every person, who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one nor more than ten years, or if such goods or other property or thing does not exceed the value of $15, he shall be fined not exceeding $1,000, and confined in the county jail not exceeding one year." (Cahill's Illinois Revised Statutes, Chapter 38.)

While this statute does not cover the receiving of money knowing it to have been obtained by false pretenses, it does prohibit the receipt of money knowing it to have been fraudulently obtained in ways amounting to larceny or embezzlement. If we applied the rule laid down in *Collins* v. *Loisel*, 259 U. S. 309, that it is not necessary that the two statutes be co-extensive in scope, there is no reason why this statute should not suffice as being sufficiently analogous to a statute making criminal the re-

ceipt of money knowing it to have been obtained by false pretense. In the State of Illinois we have a statute on false pretense (Sec. 228, Chap. 38, Cahill's Illinois Revised Statutes, 1931). In some states false pretense is recognized as a form of larceny. This is true in New York, which was held to have a crime corresponding to that of England. Fundamentally, therefore, the distinction is simply one of grouping. The crimes are all cognate, are of the same variety, and under a reasonable interpretation of the treaty this should be sufficient. It is clear, however, that in England it was not intended to limit the charge to receiving money knowing it to have been obtained by false pretense. The Broad Street Press was itself a fraud. The parties were bound together in an unlawful agreement, in the execution of which means were employed which in one instance amounted to false pretense, in another to larceny by trick, in another to larceny by bailee or embezzlement. The Fraudulent Conveyance Statute, as we have pointed out above, would suffice as regards the crime of receiving money knowing it to have been obtained by false pretense.

(1) *Larceny is committed where one obtains possession of the property of another but not the title thereto by means of a trick. Where a broker or agent has been given possession of property, conversion thereof amounts to larceny.*

In Illinois our Statute on Larceny reads as follows:

> "Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of

another, and from a house in the daytime, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any other instrument of writing of value to the owner" (Cahill's Illinois Revised Statutes, Chapter 38, Sec. 380).

One of the charges against the Broad Street Press is that it held itself out to the public as a broker, when in fact it owned the shares of the Vulcan and Rhodesia Company. By thus fraudulently holding itself out, it obtained possession of its clients' money, but not the title thereto, and without the intention to pass title to the Broad Street Press, the crime committed amounted to a larceny. This is one of the principal causes of complaint in England, namely, that the Press held itself out as doing a genuine brokerage business. Furthermore, it represented to its clients that as such broker it could obtain shares in the Asbestos Company for 5/ although they were elsewhere unavailable under 7/6. It pretended, as broker, to buy for its clients shares of stock listed on the London Stock Exchange. A pretended profit was extended to the customer in order that he might sell the listed share and invest the proceeds in the fraudulent Asbestos, Vulcan and Rhodesia Companies. Such acts are illustrative of the capacity in which the Press operated, and when its clients dealt with it they did so in the relation of broker and client and not of buyer and seller. In Illinois, Section 388 of Chapter 38, Cahill's Revised Statutes, reads as follows:

"If any bailee of any bank bill, note, money or other property shall convert the same to his own use with intent to steal the same or secretes the same with intent so to do, he shall be deemed guilty of larceny."

The Broad Street Press occupied the position of bailee of property turned over to it by its clients. We find it disobeying instructions, after it had supposedly sold a client's listed stock at a profit, to turn over the proceeds to the client and, contrary to the client's wish, the Press deliberately converted the money and sent shares of stocks in the Asbestos, Vulcan or Rhodesia Companies. This sort of dealing was always its purpose. It constitutes a fraudulent obtaining of the money by methods denounced as larceny and not merely as false pretense. In 36 Corpus Juris 774, on the subject of larceny, it is said:

> "A person in possession of the goods or moneys of another may nevertheless become guilty of larceny at common law by converting them to his own use if the felonious intent so to convert them existed at the time he acquired the possession. For the existence of such felonious intent made his possession of the chattel unlawful and the conversion is consequently a trespass upon the rights of the owner. * * *
>
> So one who, by falsely representing the price at which a thing can be purchased, obtains from the purchaser for whom he is acting as agent a greater sum than he pays to the seller, intending to convert and feloniously converting the difference is guilty of larceny. * * *
>
> (P. 778): One to whom money is delivered for a special purpose as, for example, to pay a particular debt, or to buy a particular article, or to be delivered directly to a particular person, or to be invested in a particular way, does not obtain title to the money, but is only the bailee thereof, and if it is received by him with the intention not to apply it to the purpose specified, but to convert it to his own use, he is guilty of larceny."

In the State of Illinois there is a statute reading in part as follows:

> "(Sec. 390) If any * * * agent * * * or broker of any person * * * receiving any money * * * shall embezzle or fraudulently convert or appropriate the same or any part thereof to his own use or with the intent to embezzle, shall take, secrete or otherwise dispose of or fraudulently withhold, appropriate, lend, invest or otherwise use or apply any money * * * received by him in such fiduciary capacity * * * without the consent of the person for or on account of which the same was received by him, he shall be deemed guilty of larceny. * * *" Section 390 of Chapter 38, Illinois Revised Statutes.

Here is another statute appropriately fitting the wrongful acts of the Broad Street Press and its agents. It did invest and otherwise use the money belonging to its principals without their consent. In consequence the crime of larceny was committed, and money so fraudulently taken could not thereafter be received by Factor without his being guilty under the Illinois Receiving Statute.

There is a further statute having peculiar application to the case at bar. It is Section 287, Chapter 32, Illinois Revised Statutes, 1931, and reads as follows:

> "It shall be unlawful for any officer, director, trustee, solicitor, agent or broker of or for any issuer, knowing such issuer to be insolvent, to sell any securities issued by such issuer; and any such officer, director, trustee, solicitor, agent or broker who shall make any sale of any securities of and for any such issuer, and by reason of such insolvency of such issuer, the price paid for such securities, or any part thereof shall be lost to the purchaser, shall be deemed guilty

of embezzlement and upon conviction thereof, shall be fined in a sum not less than $1,000 nor more than $10,000 or may be imprisoned in the State penitentiary for not less than one year nor more than five years, or may be both fined and imprisoned in the discretion of the court. For the purpose of this section, an issuer shall be deemed insolvent whenever the aggregate of its property shall not, at a fair valuation, be sufficient in amount to pay its debts."

The Broad Street Press pretended to sell the stock of the Vulcan and Rhodesia Companies as a broker. These companies never received the proceeds of the sale of their stock, and were consequently never solvent. It was never intended that they should be solvent.

The record shows that there was a deficiency of £500,000 in the Vulcan Company to meet the liability of shareholders (Trans., Vol 1, p. 178). There was a deficiency of £621,000 to meet shareholders of the Rhodesia Company. The act of the Broad Street Press as broker, knowing the Vulcan and Rhodesia Companies to be insolvent, and nevertheless selling such stock, has clearly made the participants in the act guilty of embezzlement. In consequence, when Factor thereafter received this money, he was guilty under the Illinois Receiving Statute.

(C) UNDER THE CRIMINAL CODE OF THE UNITED STATES ANYONE RECEIVING MONEY KNOWING IT TO HAVE BEEN FELONIOUSLY OBTAINED IS GUILTY.

Section 467, Title 18, U. S. C. A., reads as follows:

"Whoever shall buy, receive or conceal, any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen or embezzled, from any other person, know-

ing the same to have been so taken, stolen, or embezzled, shall be fined not more than $1,000 and imprisoned not more than three years; and such person may be tried either before or after the conviction of the principal offender."

Of this statute the Circuit Court of Appeals in the case at bar said:

"Appellants further contend that if identity of the crime in both demanding and asylum countries is required, this would in the instant case, be satisfied through a statute of the United States substantially defining the very crime here charged. 18 U. S. C. A., Sec. 467. This too seems to have been authoritatively decided contrary to appellants' contention. *Pettit* v. *Walshe,* 194 U. S. 205, 24 Sup. Ct. 657, 48 Law ed. 938, citing *Wright* v. *Henkel, supra.*"

Opposing counsel contend that the statute is inapplicable because of the fact that it is limited to crimes in Federal territory in the State of Illinois. The question before the extradition commissioner is *coram non judice.* The function of the examining magistrate is not to indulge in the fiction of committing the accused in the place where he is found, but to ascertain whether the crime charged is one within the purview of the treaty and whether it has been sufficiently proved. The inquiry is to safeguard the accused from surrender for some crime denominated by a treaty name yet one not intended by the parties to the treaty. In the case of *Wright* v. *Henkel,* 190 U. S. 40, 58, the Court referred to the statutes of Alaska, and other state statutes substantially defining the offense with which the fugitive found in New York had been charged. As we view this reference by the Court it negatives any implication that the test of criminality is dependent upon

state jurisdiction. Certainly there was no intention on the part of the Court to withdraw from the benefit of the treaty the right of the Federal Government to retrieve fugitives. We therefore respectfully submit that the Court of Appeals and opposing counsel have not interpreted the treaty in the liberal spirit intended. In this connection, we cited the Mail Fraud Statute, being Section 339, Title 18, U. S. C. A. Property obtained in violation of this statute would be property feloniously taken within the purview of the foregoing Federal Receiving Statute.

We believe it imperative that this court, in the interests of effective administration of our own criminal laws, give efficacy to these Federal statutes to the end that they may be recognized as crimes properly coming within the treaty. The Mail Fraud Statute, although in some instances identical with a false pretense statute, clearly comes within the treaty. There is a feeling that extradition cannot be had for this offense. This is not correct, as we view the treaty.

Judge Knox, in deciding the *Klein case* (opinion appears in appendix to brief in opposition to the petition for certiorari), notes the similarity between the case at bar and mail fraud cases in this country. We respectfully submit that this country should not sacrifice its rights under the treaty by reading out of it offenses under the Federal law, regardless of their limited territorial jurisdiction. It would be a highly technical interpretation of the treaty which would deprive Great Britain of this fugitive when in fact he was charged with an offense known and punishable by the laws of the United States. We might meet this technical objection with an equally technical stand that the fugitive who selected the time and place of his surrender did so in the post office of the United States. After having been hunted for a period of eight days, he called the chief deputy marshal and accompanied him to the Federal

Building, where the warrant issued by Commissioner Walker was undoubtedly read to him. Later on, when a new complaint was filed, this warrant was dismissed and Factor surrendered in the Commissioner's office under the new warrant, so that if such highly technical considerations have any place in a case of this kind, then it can be said that there was a Federal statute in the place where he was found which justified his commitment for crime had his offense there been committed, assuming that this is the basis of extradition.

There is a further Federal statute which embodies in the Federal Penal Code the criminal laws of the several states for the government of Federal territory within the respective states (Section 468, Title 18, U. S. C. A). The consequence of this statute is that the statute of New York making it criminal to receive money knowing it to have been fraudulently obtained is embodied in the Federal Penal Code. Can we therefore say to Great Britain that Factor is being demanded for an offense unknown to our laws? This same Federal statute would therefore embrace within its provisions Section 230 of Chapter 38, Illinois Revised Statutes prohibiting the fraudulent obtaining of money by a confidence game. This being a felony, the Federal statute on receiving would denounce the act. The Confidence Game Statute has peculiar application to the case at bar. It was part of the scheme to gain the confidence of the victim first, by extolling the ability of the fictitious editor, Norman D. Spencer, and by representations that the interests of the victim were being carefully watched. His confidence was further gained by giving him a pretended profit. Typical letters by the Broad Street Press to its victims appear on pages 273 and 274 of Volume 1 of the transcript.

In the light of these statutes we hardly see how it can be contended that what Factor and his associates have done was not criminal in Illinois. Quite the contrary, it is fortunate that such acts are criminal and that statutory provision has been made to protect just such frauds as this. There is in truth no lack of statutes denouncing the particular crime as criminal, but rather an abundance of them. Factor could be held for conspiracy, for receiving money knowing it to have been stolen, embezzled or fraudulently obtained and as accessory before the fact to crimes of larceny, embezzlement and false pretense which he engineered. It is not the province of our country to tell Great Britain it should have indicted Factor for some other offense. On the other hand, it is our duty to assist in bringing this fugitive to justice, where it is so manifest that he has committed a crime.

V.

In the case of Kelly v. Griffin, 241 U. S. 6, this Court held (p. 15) that it was criminal in Illinois to receive money knowing it to have been fraudulently obtained.

We believe that the United States stands committed to an obligation to extradite from the State of Illinois for receiving money knowing it to have been fraudulently obtained. On the one hand counsel for the fugitive seeks to escape the binding effect of the position which the United States took in this case and of the language which this Court employed in writing its decision. The demanding government, on the other hand, respectfully insists that this Court correctly stated the law and that the government of the United States stands bound to extradite for the crime charged. Counsel for Factor seek to have

this Court re-try the *Kelly case* and to examine the records to ascertain whether or not it has committed error. All manner of explanation has been attempted from time to time in the *Factor case* as to why the *Kelly case* should either not be followed or as to why it is distinguishable. We suppose such presumption on the part of a fugitive is not to be unexpected. If he is no respecter of persons he is no respecter of their institutions. The stubborn fact remains that this Court, in an extradition proceeding arising in Illinois sanctioned the extradition of the fugitive charged with this very offense.

Opposing counsel have given their version of the issues and the law applicable thereto as appearing in the *Kelly case*. We are compelled to do the same. However, such examination is unnecessary if the Court deems the statutes heretofore cited as sufficiently applicable to sustain the commitment of Factor for extradition.

The complaint against Kelly charged that he had been guilty of the following crimes (Tran. Sup. Ct., p. 40):

1. Perjury.
2. Obtaining money by false pretenses.
3. Larceny or embezzlement and receiving money knowing it to have been embezzled, stolen or fraudulently obtained.

The complaint set out that Kelly had committed perjury by swearing falsely as to the ingredients which he put into caissons in the construction of the Parliament Buildings at Winnipeg, for which he had a contract with the Province. As to the charge of obtaining money by false pretenses, the complaint set out that he obtained for Thomas Kelly & Sons, of which firm he was a member, $1,250,000 from officers having charge of the disbursal of

the Province's funds; that he received said money on account of pretended extra work and materials furnished in constructing the caissons. As to the third charge, larceny, embezzlement and the receiving of money knowing it to have been fraudulently obtained, the complaint set out that Kelly did steal money belonging to the Province and did receive money belonging to the Province which had theretofore been embezzled, stolen or fraudulently obtained by means of a conspiracy entered into between Kelly, Sir Roblin, the Premier, and others, to defraud the Province by means of fraudulent contracts and by means of pretended extra work and materials and by means of such fraudulent scheme Thomas Kelly & Sons, of which firm Thomas Kelly was a member, fraudulently obtained $1,250,000.

It is to the deposition of John Allen, the deputy attorney general of Manitoba, to which we must look for the laws which Kelly was charged with having violated. His deposition, on page 89 of the transcript, covers the perjury charge. His deposition on page 128 of the transcript, sets out that by Section 405 of the Canadian Criminal Code everyone is guilty of an indictable offense who, with intent to defraud by any false pretense, obtains anything capable of being stolen. His deposition appearing on page 159 covering the third charge mentioned in the British Consul's complaint, sets out that Section 347 of the Canadian Code covers theft, by which is meant the act of fraudulently converting to the use of a person anything capable of being stolen. Section 386 provides that everyone is guilty and liable to seven years' imprisonment who steals anything for the stealing of which no punishment is otherwise provided. Section 387 provides that if the stolen article exceeds $200 in value the offender is liable to two years' additional imprisonment. Mr. Allen says

that theft has the same meaning as larceny under the English law and the American law. Section 399 provides that everyone is guilty who receives anything obtained by any indictable offense. Section 444 provides that everyone is guilty who conspires by deceit or falsehood or fraudulent means to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, whether such falsehood would or would not amount to false pretense as hereinbefore defined. Mr. Allen thereupon stated that he had examined the information against Roblin and others who on a conspiracy charge were committed for trial and that the Kelly referred to in said information is the same one referred to in the information attached to the deposition covering the charge of theft and receiving. Mr. Allen said:

> "I have perused the deposition attached hereto, and in my opinion the evidence disclosed by the said deposition shows the crime of larceny or receiving under the laws of Canada."

The depositions in support of the charge of obtaining money by false pretense and receiving money known to have been fraudulently obtained, were substantially the same. The Commissioner who heard the *Kelly case* concluded that all the charges had been proved, and as to the third charge of receiving, the Commissioner says (Tran. Kelly case Sup. Ct. p. 284):

> "Careful comparison of the two statutes and the complaint, together with the treaty, show the intent of both Canada and Illinois to punish the crimes of perjury, obtaining money by false pretences and larceny or embezzlement and obtaining money knowing the same to have been embezzled, stolen or fraudulently obtained. It cannot be conceived that the statutes

of the various countries follow the exact wording or that the treaties in mentioning the crimes follow the wordings of both countries, but, as the Supreme Court has said, in numerous cases that legal definitions of the same crime may vary, yet the purpose and intent of the treaty was to accomplish extradition and the trial on the merits which should follow."

Page 286:

"* * * In conclusion, I am forced to the decision that the crimes of perjury, obtaining money by false pretences, and larceny or embezzlement and the obtaining of money knowing the same to have been embezzled or fraudulently obtained, are crimes contemplated by the laws of Canada, by the laws of the State of Illinois and by the treaties between the countries."

In the habeas corpus proceeding which followed, Kelly's counsel averred in the application for the writ *that the charges of larceny and embezzlement were nullified by the matters in the said complaint alleged as facts to support it* (and this is the view which the Supreme Court must have taken), and *it was further urged that receiving money knowing the same to have been embezzled, stolen or fraudulently obtained, is not criminal in Illinois.* The matter came on for hearing before Judge Landis. He delivered an oral opinion, which was later printed and incorporated in the brief filed by the demanding government in the Supreme Court of the United States. His opinion is in part as follows:

"Now I come to the last proposition. The charge in the warrant, in the complaint, is embezzlement, larceny, receiving any money, valuable security or other property, knowing the same to have been em-

bezzled, stolen, or fraudulently obtained. That is to say, under that clause of the treaty of 1889, this man is also sought to be extradited, in addition to the charge of perjury and obtaining money by false pretences. There is a dearth of authority, as far as the argument before me was concerned, and as far as my independent examination of it is concerned, on this particular clause. But in the State of Illinois there is a statute which makes it an offense for a man to receive money which is embezzled by another man. There is a statute which in my opinion makes it an offense for a man to receive money that has been fraudulently obtained to his knowledge by another person from somebody else. 'Every person who shall be a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance, had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts,' etc., 'or who being a party as aforesaid at any time shall wittingly and willingly put in use, avow,' etc., 'or defend the same or any of them as true, and done, had or made in good faith or upon good consideration, or shall sell or assign, shall be fined $1,000.'

That is the only statute I find in Illinois, strange enough, that meets the situation here. But I haven't the slightest doubt that if the evidence disclosed in this record as to what took place there in connection with the getting of this money, was put before a Court in support of an indictment appropriately drawn under that section, that the Court would be required to refuse to direct a verdict of not guilty.

The Canadian law covers the offense of receiving money obtained by fraud. In Canada it is called a theft. The extradition treaty authorizes the surrender of a person charged with receiving any money, valuable security or other property, knowing the same to have been fraudulently embezzled, stolen or fraudulently obtained. The good faith that must characterize the treatment of a demand by one Government or another Government for the surrender of a fugitive charged with an extraditable offense would not permit the United States, on the showing of fact made here, if there was no charge of perjury and no charge of obtaining money by false pretences, to refuse to give up Kelly on that charge, in my opinion, even though Kelly himself was a party to the fraud, the object and purpose and result of which was separating the Canadian Government from its money."

Thus, Judge Landis placed out of the sphere of dispute what statute he had in mind. The Fraudulent Conveyance Statute he held made the receipt of money knowing it to have been fraudulently obtained, criminal. When the case reached the Supreme Court of the United States his decision was undoubtedly given earnest attention.

The very fact that they did not dissent from Judge Landis' opinion ought to be and is conclusive that the actions of the Commissioner and Judge Landis were affirmed in all respects, and certainly it was the right of the demanding government to assume that a decision such as that of Judge Landis explicitly applying the Illinois statute to a state of facts was correct beyond peradventure of a doubt. Had the case gone no further than that, the demanding government would have a right to rely upon this pronouncement of one of the Courts of

the United States as the law. It had a right to assume that henceforth extradition would be granted on this charge without question where the fugitive was located in Illinois. The Supreme Court in the *Kelly case* says, page 15:

> "The last charge, stealing or embezzling and receiving money fraudulently obtained, needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzlement as (commonly) defined, but *the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois.* There may be a doubt whether the appellant, if a party to the fraud, received the money of the government directly from it, or through a third hand, so as to be guilty under this count of the complaint. We are not prepared to pronounce his detention upon the count unjustifiable, in view of the finding. We assume, of course that the government in Canada will respect the convention between the United States and Great Britain, and will not try the appellant upon other charges than those upon which the extradition is allowed. Therefore, we do not think it necessary to require a modification of the complaint before the order discharging the writ of habeas corpus is affirmed." (Italics ours.)

Before the Commissioner Factor's counsel took the position that the *Kelly case* had been erroneously decided. The so-called legal experts which they produced could not agree on anything but that the Supreme Court was in error. One held that the statement by the Supreme Court was dicta and therefore need not be followed; another held that because Kelly was to be extradited on two other charges the third was allowed to slip through without serious attention; another held that the question was one of

fact which the Supreme Court decided incorrectly. This procedure of course makes a farce of an extradiction case. We vigorously opposed the production of these witnesses and they proved just as unsatisfactory as expert witnesses usually are. We requested the Commissioner that if he was in doubt as to the law, in deference to the demanding government it was incumbent upon him to ask an advisory opinion from the District Court or refer the matter to the Secretary of State and the attorney general for a decision. These expert witnesses did not agree on the interpretation of various other statutes. On cross examination one of them testified that the receiver of property obtained by false pretense might be tried as an accessory after the fact. On re-direct examination he reversed himself. It was the testimony of these so-called experts which persuaded Judge Carpenter to hold that receiving money, knowing it to have been fraudulently obtained was a question of fact. The Court of Appeals has pointed out Judge Carpenter's error in this regard, but Judge Carpenter suggested that perhaps (and he only guessed at this, as shown by the fact that opposing counsel have never satisfied even themselves as to the basis of Mr. Justice Holmes' decision) Mr. Justice Holmes had in mind that Kelly received money from government officials which they had embezzled. This position, we believe, is conclusively refuted by the fact that in the *Kelly case* the provincial officials never had possession of the money of the province, but this money was paid out of the province's bank account by checks issued to Thomas Kelly & Sons upon *false estimates submitted to the province with letters signed by Lawrence C. Kelly.* It is manifest that the theory of the case as laid in Canada was not that Kelly received money which provincial officials had embezzled. The statutes which Mr. Allen, deputy attorney general,

cited, afford no warrant for this conclusion. Mr. Allen testified that these officials had been indicted for conspiracy. It was not disclosed, and quite likely was not the fact, that they were indicted for embezzlement. Moreover, had this been the theory, Kelly would have been charged with, and surrendered for, receiving money knowing it to have been embezzled. Opposing counsel had been misguided by the fact that in the brief of the demanding government a number of statutes were cited covering embezzlement in a variety of forms, but these are allocatable to the charge against Kelly himself that he was guilty of "*larceny, embezzlement,* and the receiving, etc."

If we are to apply the proposition propounded by opposing counsel, that the act charged must be criminal under the laws of both the demanding and the asylum country, then the demanding government was limited to statutes in Illinois or the United States corresponding to the statutes cited by Deputy Attorney General Allen as being the statutes violated by Kelly. In the demanding government's brief, Section 347 of the Canadian Code covering theft, was cited. Section 359, Sub-section C, covering theft by a person in the employ of the Government, was cited. Obviously, this was not one of the statutes violated, or else Mr. Allen would have founded his opinion upon it. The evidence completely negatives any charge of theft by government officer or by private individuals.

The goverment's money was obtained by false pretense in the presentation of false estimates by Thomas Kelly & Sons, and it appeared that Lawrence C. Kelly was the one who submitted these estimates. The provincial officials were aware of what was being done, but they could not possibly have been held for theft. They never had possession of the money, so that it is impossible that the charge against Kelly was predicated upon the theory that

he received money from government officials knowing that they had embezzled it. The next statute, cited in the government brief was the Canadian Receiving Statute, being Sections 399, 400 and 402. These were all of the Canadian statutes cited in the brief and some of them had not been cited by Mr. Allen as forming the basis for the charge. The next statute cited in the demanding government brief was Section 167, Chapter 38 of the Illinois Revised Statutes, being a general statute on larceny. The next statute cited was Section 74, covering embezzlement, also a statute of general application. The next statute cited was Section 80, which provided that if any state officer embezzles or fraudulently converts any money belonging to the state he is guilty. We submit that while this statute was cited, it had absolutely no counterpart among the statutes cited by Mr. Allen as the basis for the charge in Canada against Kelly, and could therefore not have been the basis for Mr. Justice Holmes' conclusion, that receiving money knowing it to have been fraudulently obtained is criminal in Illinois. This is one of the statutes which opposing counsel contend was the basis of the Supreme Court holding. However, if this were the statute, then the crime against Kelly was receiving money knowing it to have been embezzled and not receiving money knowing it to have been fraudulently obtained.

Assuming, for the sake of argument, that this statute, together with the statute on receiving stolen property, warrants the expression that receiving money knowing it to have been fraudulently obtained, is criminal in Illinois, we have lost no ground in the *Factor case*, because Section 80 has a counterpart as applied to the peculations of private individuals, and we have heretofore discussed the applicability of the latter statute, under Point IV. The companion statute is Section 390 of Chapter 38, Illinois

Revised Statutes. Whereas the facts in the case at bar make this statute applicable in view of the fact that it covers peculations of the Broad Street Press as agent and broker of its victims, we believe it is the better view that Section 80, being inapplicable in the *Kelly case,* could not have been the statute which Mr. Justice Holmes had in mind. We cannot conceive it to be possible that he would have said that the receiving of money knowing it to have been fraudulently obtained was criminal in Illinois, when in fact he meant that the receiving of money knowing it to have been embezzled was criminal in Illinois.

The next statute cited in the brief of the demanding government is the Fraudulent Conveyance Statute, which Judge Landis held was applicable, and Judge Landis' opinion was attached to the brief and was doubtless considered an adequate exposition of the application of that statute.

The next statute cited in the demanding government brief was Section 5438, now Section 80, Title 18, which provides that whoever presents or causes to be presented for payment or approval, any claim against the Government knowing it to be false, etc., shall be guilty. It is inconceivable that this statute was the one which Mr. Justice Holmes had in mind when he said that *by the law of Illinois* it was criminal to receive money knowing it to have been fraudulently obtained.

The next statute is 5497, now Section 182, Title 18, which provides that every banker or other person who shall knowingly receive any money of the United States otherwise than in payment of a debt, is guilty of embezzlement. It is illogical to contend that this was the basis of the holding by Mr. Justice Holmes that *by the laws of Illinois* it was criminal to receive money knowing it to

have been fraudulently obtained. It is very logical to believe that this was what prompted him to say that "it may be assumed that there is no evidence of larceny or embezzlement as commonly defined," because this is admittedly a very unusual kind of embezzlement wherein the usual fiduciary relationship is not required.

Judge Evans, in the Circuit Court of Appeals, who filed a dissenting opinion, says that the *Kelly case* is distinguishable from the one at bar, yet he fails to point this out. Judge Carpenter thought that Mr. Justice Holmes must have meant money fraudulently obtained by a public official, but, as we have pointed out, this could only have been an embezzlement statute, and there was no evidence of embezzlement. If it had been the theory of Mr. Justice Holmes that the original crime was that of government officials, then he and the counsel for the demanding government would undoubtedly have referred to Section 101, Title 18, which punishes anyone who receives any property of the United States which has theretofore been embezzled, stolen or purloined by any other person. Neither Judge Evans nor Judge Carpenter have given any material aid in clarifying the decision of the Supreme Court, if it is wrong. On the other hand, a logical analysis is avoided.

We believe that the Canadian government was resorting to a common practice in criminal prosecutions, of indicting one who is accessory before the fact (the distinction between the two being removed by statute), as both principal and as receiver of the property unlawfully obtained by another.

Kelly was charged with obtaining $1,250,000 by false pretense. He was party to a conspiracy, yet the evidence which would establish the crime of false pretense did not show that Thomas Kelly, the fugitive, had committed the

crime unless it was as accessory before the fact. His son, Lawrence Kelly, was the one who actually submitted the false and fraudulent estimates which formed the basis of the false pretenses upon which the Government paid out its money. The firm of Thomas Kelly & Sons, of which firm Lawrence Kelly and Thomas Kelly were partners, was thereafter paid the money. It was indeed feasible, therefore, to charge Kelly with both the crime of obtaining money by false pretense and receiving money which he knew had been so obtained. In such a situation Judge Landis felt that the Fraudulent Conveyance Statute was applicable. Mr. Justice Holmes was reviewing that very decision, and it seems incredible that he would have allowed it to stand uncorrected, to misguide and to confuse the demanding government had he believed it wrong. Quite the contrary, the very makeup of his treatment of the receiving charge and the treatment of this charge by Mr. Justice Holmes shows that he was following Judge Landis' opinion. Judge Landis says, "Now I come to the last proposition." Mr. Justice Holmes says, "The last charge needs a word of explanation." Judge Landis held it criminal by the law of Illinois to receive money knowing it to have been fraudulently obtained, and he cited the Fraudulent Conveyance Statute. Judge Holmes reiterates the finding although he did not cite the statute. Judge Landis said:

> "The good faith that must characterize the treatment of a demand by one government on another government for the surrender of a fugitive charged with an extraditable offense, would not permit the United States, on the showing of fact made here if there was no charge of perjury and no charge of obtaining money by false pretenses, to refuse to give up Kelly on that charge, in my opinion, even though Kelly himself was a party to the fraud."

Mr. Justice Holmes, with his characteristic ability to be terse, says:

> "There may be a doubt whether the appellant, if a party to the fraud, received the money of the government directly from it or through a third hand so as to be guilty under this count of the complaint. We are not prepared to pronounce his detention upon the count unjustifiable in view of the finding."

As opposed to the view of Factor's counsel that this is an incorrect statement of the law, we find Commissioner Walker, Judge FitzHenry, Judge Dickinson and finally the Court of Appeals, taking the view that it correctly stated the law. In addition, the demanding government is here, saying to the Court that it has so understood the statement. The executive department of the government has made no effort to retract from its obligation. It has surrendered Geen from a state whose laws were no more favorable to extradition than those of Illinois, assuming there is anything unfavorable in either, and we respectfully submit to the Court that there is every justification for its adherence to the decision heretofore rendered.

VI.

The Dawes-Simon Treaty has not come into force in view of the provision therein that it shall not come into force until ten days after its publication in conformity with the forms prescribed by the laws of the high contracting parties.

It will be recalled that the Court of Appeals ruled that on the evidence submitted it was unable to say whether or not the treaty was in effect, holding, however, that assuming it to be in effect it did not abrogate this pro-

ceeding. We believe this question is one primarily for the consideration of the executive department, as the consequence of any ruling by this Court cannot possibly put the treaty in effect in England when its laws decree otherwise. This is stated with the utmost deference to this Court, for which the highest respect is due. Of course, if the United States, by its executive officers, were to insist that the treaty was in force in England, and therefore in this country, the question then might become one for negotiation by the two countries. However, it is not contended by the Government of the United States that the treaty is in force. Necessary steps have been taken in both countries, but under the laws of England it cannot and will not come into force until an order in council has been promulgated and the order and treaty published. The Government of the United States has for a long period realized that this procedure is necessary in England.

In re Metzger, 17 Fed. Cas. 9511, the Court says, page 234:

> "A great distinction exists between the effect and operation of a treaty under our constitution, and that given them in England. 3 Story, Const. Law, 1515. In that country a treaty is regarded only as a contract addressed to the political power, and an Act of Parliament is required to give it effect infraterritorially. 1 New Sess. Cas. (Eng.) 33."

If these two countries will not respect the requirements of their respective laws there is little occasion to negotiate a treaty, but it was out of consideration for the laws of the two countries that the plenipotentiaries agreed that the treaty should not come into force until ten days after its publication, in conformity to the laws of both

countries. It was known that in England the Extradition Act of 1870 (Vol. 8, Butterworth's Compiled Statutes of England, 1929) provides:

"Sec. 2. Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State.

Her Majesty may, by the same or any subsequent Order limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of her Majesty's dominions specified in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such Order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.

Every such Order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the 'London Gazette.'

* * *

Sec. 5. When an Order applying this Act in the case of any foreign State has been published in the 'London Gazette,' this Act (after the date specified in the Order, or if no date is specified, after the date of the publication) shall, so long as the Order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the Order, apply in the case of such foreign State. An Order in Council shall be conclu-

sive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign State mentioned in the Order, and the validity of such Order shall not be questioned in any legal proceedings whatever."

The Privy Council, composed as it is of the King, his cabinet and those honored persons designated as Privy Councilors, has not promulgated its order. The treaty, which is embodied in the order of the Council, has not been published in the London Gazette.

In Crandall on Treaties—Their Making and Enforcement, it will be found in the chapter on extradition that this is the usual and indispensable procedure in Great Britain and has consistently been followed since 1870. Prior to this act, special legislation was necessary to give effect to a treaty. Parliament on August 22, 1843, passed a law putting into force the treaty of 1842 between the United States and Great Britain and denied effect to a treaty with France.

Furthermore, this order in Council will not be issued if the treaty is in derogation of or enlarges upon the Extradition Act. However, should the order in Council be promulgated, the Extradition Act provides that the order is conclusive evidence that the treaty and the act are in accord. It is apparent that this provision is made to clothe the action of the plenipotentiary and the council with finality to the end that such action has the requisite sanctity having regard to its international character. The order in Council will therefore be withheld when that body deems the engagement broader than the Extradition Act. The matter is submitted to Parliament which, if it deems the new undertaking desirable, will amend the Ex-

tradition Act so as to make it co-extensive with the proposed treaty. After the amendment, the Privy Council will enter the necessary order and publish the treaty. What has just been outlined is illustrated by the course of events taking place in connection with the supplemental treaty of 1905 between the United States and Great Britain. This treaty added the crime of bribery which was not enumerated in the Extradition Act as an extraditable crime. The matter was submitted to Parliament which thereupon amended the Extradition Act by adding bribery as an extraditable crime. The order in council was thereafter issued on February 11, 1907. Whether parliamentary action is deemed necessary by the Privy Council with reference to the Dawes-Simon treaty we are not informed. The fact remains that the necessary order to put that treaty in force has never been entered.

In Crandall on Treaties appears the dates of treaties entered into between Great Britain and various foreign countries, together with the dates when the requisite orders in council were promulgated.

We have endeavored to outline the course of action necessary before the treaty can come into force in Great Britain. This legal situation in Great Britain explains the holding of the secretary of state that the new treaty is not and cannot be in force.

In 10 American Journal of International Law appears an article by Quincy Wright entitled, "The Legal Nature of Treaties." It is said, page 709:

> "These statements, however, are made on the supposition that agreement is reached as to what constitutes a valid treaty. What procedure must be consummated before an instrument negotiated between the executive authority of two nations becomes a genuine treaty at international law? Signature by the

plenipotentaries, with full powers to conclude the treaty, does not have that effect. Ratification by the authority in either or both signatory states, competent by their constitutions to perform that function, does not. It is only after exchange of ratifications, evidenced by official publication in the signatory states, that the instrument is generally considered internationally binding, in the sense that the national honor is pledged to its observance and a violation will give just cause for diplomatic protest. This then is the criterion selected for deciding when an instrument is a treaty at international law, and hence for deciding whether treaties are an immediate source of law to be applied by courts."

At page 716, it is said:

"In fact the incapacity of English courts to apply treaties immediately is so well known that the United States Supreme Court took occasion to animadvert to it in the case of *U. S.* v. *Rauscher;* (quoting from 117 U. S. 407).

This very notoriety of the British practice, however, makes it incumbent on states concluding treaties with Great Britain to take cognizance of it, and so to regard the passage of an enabling act as a necessary step in the definitive completion of a treaty."

At page 721, it is said:

"In England where the enabling statute rather than the treaty furnishes the rule for the court, private rights are of course only altered from the date designated by that instrument."

Thus it can be seen that the Dawes-Simon Treaty was negotiated with the fact in the minds of the plenipoten-

tiaries that the same could not come into force in England until the order in Council had been promulgated, and consequently it was provided that the treaty should not be in force until ten days after its publication in conformity with the laws of the respective countries.

This Court will see (Trans. Vol. 2, pp. 1243-1246) that the Embassy of the United States advises that the treaty is not in force; that the London Gazette has not published the order; that the Secretary of State of the United States expresses his understanding that an order in Council is necessary; and that the British view, as expressed by the British Ambassador, is to the same effect. We hardly see how the position of the Court could be better expressed than it has been by Mr. Justice Taney, in the case of *Doe* v. *Braden*, 57 U. S. (16 Howe) 635, cited by opposing counsel (p. 37 of Petitioner's Brief), in which the Court lays down the proposition that the courts have no right to annul or disregard any treaty provisions, and points out that it would be impossible for the Government to carry on foreign relations if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation, had the power by its constitution and laws to make the engagement into which he entered. The opinion goes on to say that it was for the President and the Senate to determine whether the King of Spain could make a treaty. There is no dispute between the two governments so far as we are aware. It is well understood that the treaty cannot come into force until the English law has been fulfilled. We hardly think the authorities cited by opposing counsel on pages 38 and 39 of their brief require a ruling whether or not the Crown has the right to make a treaty or when it shall come into force. Due respect to the demanding government would concede to it the prov-

ince of determining what the requirements are under its own law.

(A) EVEN ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE DAWES-SIMON TREATY IS IN FORCE, IT CANNOT ABROGATE THIS PROCEEDING.

See in this connection *Ex parte* Dove, 49 Fed. 2d 816; *Armstrong* v. *Bidwell,* 124 Fed. 690, 692, 694; *Shepard* v. *N. W. Life Insurance, Co.,* 40 Fed. 341, 347; *Kenton* v. *Pontalba,* 40 La. Rep. 342; *Welander* v. *Hoyt,* 176 N. W. 954, 957 (Ia.).

Viewed as a statute, the Dawes-Simon Treaty would not affect pending proceedings, because it is merely a revision of the old treaty and is hence inapplicable to pending proceedings. In the case of *Great Northern Railway Co.* v. *U. S.,* 155 Fed. 945, the Court had under consideration the question whether the enactment of the Hepburn Act prevented prosecution of the defendant charged with violating the Elkins Act, which was purported to be repealed. Circuit Judge VanDevanter, now Mr. Justice VanDevanter, wrote an elaborate opinion, carefully reasoned and supported by abundant authority. To the same effect is the case of *Merlo* v. *Coal Mining Co.,* 258 Ill. 328. This position is also sustained in Black, on Construction and Interpretation of Laws (2d Ed.) pp. 584, 424 and in 59 C. J. 1181, 1184, 1191.

Factor's counsel, in their brief in support of their motion to dismiss the proceedings in the Court of Appeals, said: "It follows, therefore, that the rules of construction as to the effect to be given acts of Congress apply with equal force to treaties. They are also acts of Congress." In Spear on Extradition (2d ed. 1884) the author says, page 117: "A treaty among and for the people of the United States is a law and courts, both State and Federal,

are bound to so regard and administer it in every case in which it applies and for the protection of every right which it secures."

In the case of *Terlinden* v. *Ames*, 184 U. S. 270, the Court quotes Chief Justice Marshall in the case of *Foster* v. *Neilson*, 2 Pet. 253, as follows:

> "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision."

To the same effect is 26 R. C. L. 926. It seems to be the law that any provision given the force of a statute by a legislature is deemed a statute. *Williams* v. *Bruffy*, 96 U. S. 176; *Stevens* v. *Griffith*, 111 U. S. 48; *New Orleans Co.* v. *Louisiana Co.*, 125 U. S. 18. Viewing the treaty in this light we believe that Section 29 of Title 1, U. S. C. A. is a complete answer to opposing counsel's contention that the repeal of the treaty of 1889 by the Dawes-Simon Treaty extinguishes Factor's liability under the former treaty. That section provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing clause shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

(B) THE PROVISION OF THE NEW TREATY MAKING EXTRADITABLE THE RECEIVING OF ANY MONEY KNOWING IT TO HAVE BEEN STOLEN OR UNLAWFULLY OBTAINED INCLUDES ALL CRIMES EMBRACED IN THE SAME PROVISION OF THE TREATY OF 1889.

Opposing counsel contend that the application of the doctrine of *ejusdem generis* excludes this interpretation. They frankly admit (p. 52 Petitioner's Brief) that the words "unlawfully obtained" might be sufficiently broad to cover "fraudulently obtained", but it is argued that the impression vanishes because, given this construction, it would include receiving property knowing it to have been obtained in any manner contrary to the criminal law. We hardly need to indulge in this speculation. A reasonable construction of the contract would exclude any interpretation where the crime antecedent to the receiving was not itself an extraditable crime.

It must be admitted that the words "fraudulently obtained" are included in the words "unlawfully obtained". Opposing counsel say (p. 56, Petitioner's Brief) that it is necessary to restrict the expression "unlawfully obtained" to the same type of unlawfulness as stealing, or, in other words, to some taking against the will and without the consent of the owner of the property. This statement, unsupported by authority, fails to give due significance to the word "stealing" and, if applied, would leave the treaty without provision against the receiving of money obtained by robbery or larceny by trick or embezzlement. Clearly, no such construction was intended. In its common acceptation the word "steal" is said to be synonymous with "abstract," commit "larceny," "theft," "embezzle," "extort," "plunder," "rob," "swindle". See Funk & Wagnall's new Standard Dictionary, (unabridged). In addition it is said, in 59 C. J. 1223:

"Moreover, the term (referring to steal, stolen and stealing) may imply a criminal taking, carrying away or conversion, not only by way of larceny but also by way of burglary, embezzlement, false pretenses or robbery."

Counsel cite the case of *Commonwealth* v. *Kelly*, 180 Mass. 320, as not supporting this statement from Corpus Juris, because the Massachusetts statute on larceny porvided that it should include false pretenses. Such authority is all the more reason why even the application of the doctrine of *ejusdem generis* would not exclude the crime charged from the new provision of the treaty. Larceny, larceny by trick and false pretense are all crimes of a kindred nature. So closely related are they, and so difficult to distinguish at times, that the False Pretense Statute in the Criminal Code of Illinois, Chapter 38, Section 228, provides that no indictment for false pretense shall be quashed, nor shall any indicted person be acquitted because the facts set forth in the indictment or appearing in the evidence may amount to larceny or other felony, nor shall it be deemed essential to a conviction that the property in the goods so obtained shall pass with the possession to the person so obtaining it. Without speculating as to what other crimes might be included under the provision of the Dawes-Simon Treaty, we think it is manifest that the framers of the treaty intended to, and did, enlarge the corresponding provision in the Treaty of 1889. A comparison of the Dawes-Simon Treaty and the other extradition treaties with Great Britain clearly discloses a purpose to make the system of extradition more effective. It does not indicate a change of policy. It is an enlargement of the obligation, deemed feasible in view of the success experienced by the two coun-

tries in the past in extradition matters. The new treaty likewise indicates a recognition of the need to strengthen the process.

CONCLUSION.

While it may be, as observed by Factor's counsel, that the object of a treaty is not to secure unrestricted surrender of fugitives, yet:

> "When reclamation of a fugitive from justice is made under treaty stipulation by any foreign government, it is the duty of the United States to aid in relieving the case of any technical difficulties which may be interposed to defeat the ends of public justice, the object to be accomplished being alike interesting to both governments, namely, the punishment of malefactors, who are the common enemies of all society." (7 Opinion, Att'y. Gen. 537.)

If this Court were confronted with a situation where Great Britain's contention as to its rights under the treaty were challenged by the government of the United States, then indeed this Court might pause before it sanctioned the decisions of the Commissioner and the Circuit Court of Appeals. On the contrary, we find that the United States recognizes its obligation to surrender for this crime under the treaty and has actually surrendered Klein and Geen, and the laws under which the latter fugitive was surrendered were just as doubtful, if any doubt exists, as those in the State of Illinois. But it is the fugitive who is challenging Great Britain's interpretation of the treaty. It is the one who has flouted and violated the law who now seeks refuge under his dubious interpretation of the laws of this country. As the courts have thus far been persuaded to

the responsibility of the United States to extradite with the dissent of only two members of our courts, the doubt, if any exists, ought to be resolved in favor of extradition, where such a salutary result follows, namely, that the fugitive may be placed upon trial.

We are of the opinion that the *Kelly case* (241 U. S. 6, 15) was a correct pronouncement of the law. Again it is the fugitive who demands a re-examination of that decision, but the very fact that the decision admits of no more doubt as to its correctness than that only two judges, who do not analyze it or clarify it, question it, ought to induce an adherence to the holding. Commissioner Walker, Judge Dickinson, Judge FitzHenry, Judge Alschuler and Judge Sparks have been persuaded to the view that the precise point has been ruled upon and found adversely to the contention of the fugitive and that the decision correctly states the law. These judges have gone the whole way in sanctioning the demanding government's interpretation of this case. This strength ought to outweigh the opposition. There is no reason why the demanding government's interpretation should not be acceded to, as opposed to the interpretation of the fugitive.

With regard to the Dawes-Simon Treaty, the two governments are, up to this time, in accord that it is not in effect, and it would seem so inconsistent that the governments which are trying to agree should be driven into disagreement. It is respectfully submitted, however, that the new treaty is conceived in a spirit which recognizes the problems of society in general and seeks to assist in their solution.

> "At last, however, it seems to have been discovered that the thief, the ruffian, or the forger was not a particularly valuable acquisition; and that, although it might be highly desirable that offenders against our

laws should be brought back here and tried as a deterrent example, it was possibly more important that this country should not be made a city of refuge for foreign criminals, and that an enlightened public policy would be astute to return them, once we were satisfied that they were criminals." (*In re* Neely, 103 F. 626.)

It is with profound respect that we urge that the case at bar does not present an occasion for the Supreme Court to break the long line of decisions which it has rendered in the interests of an effective system. This Court has ever been alert to see that the treaty is executed in the same spirit in which it was made. Reciprocity by Great Britain is compelled if we now sustain the demand. The opportunity is presented to this Court to point the way by which our Federal statutes may be given the assistance of the treaty, for which a need is now being keenly felt, but where hesitant steps refrain from taking the path.

Respectfully submitted,

FRANKLIN R. OVERMYER,
Attorney for Respondents.